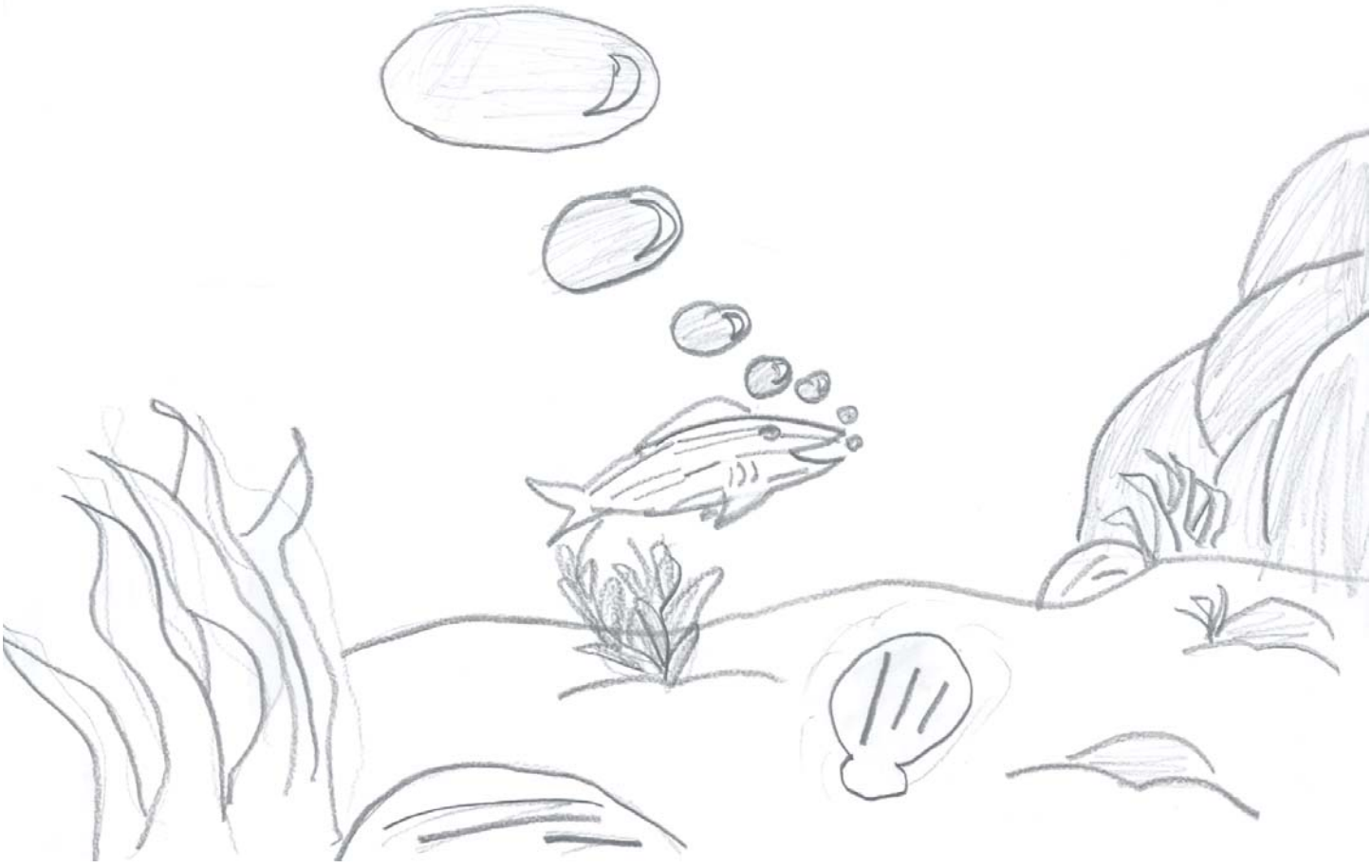
TEXAS REGISTER

Volume 36 Number 6 *February 11, 2011* *Pages 685 – 884*

Abram Hernandez
6th Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 120-090),** is published weekly (52 times per year) for $211.00 ($311.00 for first class mail delivery) by LexisNexis Matthew Bender & Co., Inc., 1275 Broadway, Albany, N.Y. 12204-2694.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Albany, N.Y. and at additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** 136 Carlin Rd., Conklin, N.Y. 13748-1531.

a section of the
Office of the Secretary of State
P.O. Box 12887
Austin, TX 78711-3824
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IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Proclamation 41-3246

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, issued an Emergency Disaster Proclamation on December 21, 2010, as extreme fire hazard posed a threat of imminent disaster in specified counties in Texas.

WHEREAS, the extreme fire hazard continues to create a threat of imminent disaster for the people in the State of Texas.

WHEREAS, the state of disaster includes the counties of Andrews, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brooks, Brown, Burleson, Burnet, Caldwell, Calhoun, Callahan, Cameron, Carson, Castro, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Colorado, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dallas, Dawson, Deaf Smith, Denton, DeWitt, Dickens, Dimmit, Donley, Duval, Eastland, Ector, Edwards, Ellis, El Paso, Erath, Falls, Fayette, Fisher, Floyd, Foard, Fort Bend, Freestone, Frio, Gaines, Galveston, Garza, Gillespie, Glasscock, Goliad, Gonzales, Gray, Grimes, Guadalupe, Hale, Hall, Hamilton, Hansford, Hardeman, Harris, Hartley, Haskell, Hays, Hemphill, Hidalgo, Hill, Hockley, Hood, Houston, Howard, Hudspeth, Hutchinson, Irion, Jack, Jackson, Jeff Davis, Jim Hogg, Jim Wells, Johnson, Jones, Karnes, Kendall, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, Lamb, Lampasas, LaSalle, Lavaca, Lee, Leon, Limestone, Lipscomb, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Medina, Menard, Midland, Milam, Mills, Mitchell, Montague, Montgomery, Moore, Motley, Navarro, Nolan, Nueces, Ochiltree, Oldham, Palo Pinto, Parker, Parmer, Pecos, Polk, Potter, Presidio, Randall, Reagan, Real, Reeves, Refugio, Roberts, Robertson, Runnels, San Jacinto, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terrell, Terry, Throckmorton, Tom Green, Travis, Trinity, Tyler, Upton, Uvalde, Val Verde, Victoria, Walker, Waller, Ward, Washington, Webb, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wilson, Winkler, Wise, Yoakum, Young, Zapata, and Zavala.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat. As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster. In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 19th day of January, 2011.

Rick Perry, Governor

Attested by: Esperanza "Hope" Andrade, Secretary of State

TRD-201100403

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0941-GA

Requestor:

The Honorable Gail Lowe

Chair, State Board of Education

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Permissible Investments of the Permanent School Fund (RQ-0941-GA)

Briefs requested by February 25, 2011

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201100427
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

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Opinions

Opinion No. GA-0838

The Honorable Todd Hunter

Chair, Committee on Judiciary and Civil Jurisprudence

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Proper compliance of a publication with the provisions of section 2051.044, Government Code, in order to be considered the official newspaper of a municipality (RQ-0907-GA)

S U M M A R Y

Because the City of Ingleside's designated newspaper publishes in Aransas County and is entered as second-class postal matter in that same county, it complies with the requirements of Government Code section 2051.044(a)(3).

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201100426
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Requests

AOR-559. The Texas Ethics Commission has been asked to consider whether a general-purpose political committee may raise contributions from corporations to defray legal expenses incurred in defending lawsuits filed against the committee and its campaign treasurer and whether such contributions are required to be disclosed on campaign finance reports.

AOR-560. The Texas Ethics Commission has been asked to consider whether the revolving door law prohibits a former employee of the Texas Department of Transportation from performing certain services related to road projects.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201100425
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: February 2, 2011

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 23. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT (EPSDT) MEDICAL PHASE

1 TAC §355.8445

The Texas Health and Human Services Commission (HHSC) proposes to add new §355.8445, concerning Reimbursement for Environmental Lead Investigations.

Background and Justification

The proposed new rule is the result of a new medical policy adding environmental lead investigations as a benefit for Medicaid clients under age 21. Prior to the creation of this new Medicaid benefit, certified lead assessors employed by the Department of State Health Services (DSHS) were providing this service without the ability to obtain federal Medicaid matching funds for the cost of providing this service. The implementation of the new benefit allows DSHS employees and employees or contractors of local health departments who are certified lead assessors to bill Medicaid directly for providing this service, and allows the state to obtain federal Medicaid matching funds for the cost of each environmental lead investigation.

Section-by-Section Summary

Proposed new §355.8445 describes the reimbursement methodology for environmental lead investigations.

New §355.8445(a) clarifies that a rate is established per completed investigation.

New §355.8445(b) provides the methodology used to determine the initial Medicaid rate for this service.

New §355.8445(c) indicates that the rate will be adjusted periodically and describes the methodology that will be utilized to adjust the rate.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed rule is in effect there will be a fiscal impact to state government of $5,769 general revenue and $16,033 all funds for state fiscal year (FY) 2011; $15,361 general revenue and $38,938 all funds for FY 2012; $15,877 general revenue and $40,247 all funds for FY 2013; $16,394 general revenue and $41,556 all funds for FY 2014; and $16,910 general revenue and $42,865 all funds for FY 2015. This fiscal impact reflects an increase in the receipt of federal matching funds resulting from the billing of this service as a Medicaid service where previously it was funded with only state funds. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro-businesses as a result of enforcing or administering the proposed new rule. Providers will not be required to alter their business practices as a result of the rule. There are no significant other costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that for each year of the first five years the proposed new rule is in effect, the public will benefit by the adoption of this rule by establishing a rate methodology which will allow DSHS employees and employees of local health departments who are certified lead assessors to bill Medicaid for their services and the state will receive a federal match for the cost of each environmental lead investigation.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Dan Huggins, Director of Acute Care, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax to (512)

491-1998; or by e-mail to dan.huggins@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed new rule affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8445. Reimbursement for Environmental Lead Investigations.

(a) A rate is established per completed environmental lead investigation.

(b) The initial rate is based on the estimated cost to perform an inspection of a child's primary dwelling. The estimated costs used to develop this initial rate include: estimated salary and fringe benefits cost and estimated indirect costs.

(1) Estimated Salary and Fringe Benefits Cost. The estimated number of staff hours required per environmental lead investigation is multiplied by the estimated salary and fringe benefits per hour to determine the estimated salary and fringe benefits cost per investigation.

(2) Estimated Indirect Cost. The estimated annual equipment cost is calculated by dividing the equipment cost by the estimated life in years of the equipment. The estimated annual supply cost is calculated by multiplying the cost of lead testing supplies necessary for each instrument by the total number of instruments. This estimated annual equipment cost is then added to the estimated annual supply cost and the total is divided by the estimated number of environmental lead investigations that will be completed annually to determine the estimated indirect cost per investigation.

(c) The rate for environmental lead investigations will be reviewed and updated periodically by projecting the initial rate from the historical cost period used to develop the initial rate to the prospective rate period using the Personal Consumption Expenditures (PCE) Chain - Type Price Index or revising the estimated costs used to determine the rate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100365
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 3. TEXAS FEED AND FERTILIZER CONTROL SERVICE/OFFICE OF THE TEXAS STATE CHEMIST

CHAPTER 61. COMMERCIAL FEED RULES

SUBCHAPTER H. ADULTERANTS

4 TAC §61.67

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes new §61.67, concerning General Provisions for the Use of Aflatoxin Binding Agents in Customer-Formula Feed.

Dr. Tim Herrman, State Chemist and Director, Office of the Texas State Chemist, concludes that for the first five-year period there will be no fiscal implication for state or local government as a result of enforcing or administering the rule. Use of binding agents in grain, oilseeds, processed grain and oilseed meals prohibited in this rule could damage export markets for U.S. corn producers, merchandisers, and shippers.

Dr. Herrman also concludes that the first five years the new rule as proposed is in effect the public benefit will include improved risk management to help mitigate aflatoxicosis, resulting in improved animal health and food safety. No anticipated additional regulatory cost to individuals and small or micro businesses will be incurred.

Comments on the proposal may be submitted to Dr. Herrman by mail at Office of the Texas State Chemist, P.O. Box 3160, College Station, TX 77841-3160; by fax at (979) 845-1389; or by e-mail at the following: tjh@otsc.tamu.edu.

The new rule is proposed under Texas Agriculture Code §141.004 which provides Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist with the authority to promulgate rules relating to the distribution of commercial feeds.

The Texas Agriculture Code, Chapter 141 of the Texas Commercial Feed Control Act, Subchapter C, §141.053 and Subchapter A, §141.004 are affected by the proposed new rule.

§61.67. General Provisions for the Use of Aflatoxin Binding Agents in Customer-Formula Feed.

(a) The provisions of this section apply to the use of aflatoxin binding agents in customer-formula feeds as defined in the Texas Agriculture Code §141.001(7). Labeling requirements for customer-formula feed set forth in §141.053 of the Texas Commercial Feed Control Act require the name and number of pounds of the binding agent to be included on the feed label, and the aflatoxin content to meet defined action levels as established in §61.61(a)(6) of this title, poisonous or deleterious substances.

(b) In addition to these provisions, the distributors of customer-formula feed shall comply with all applicable provisions of the Texas Feed Rules, and other applicable law.

(c) The specific binding agent must include directions for use approved by the Service prior to distribution of any binding product. Any claims for aflatoxin binding made on the product labeling must be approved by the Service.

(d) Processors shall keep records for two years to ensure correct use and quantity of the binding agents used in customer-formula feed for review by the Service pursuant to the Texas Agriculture Code §141.074, records; additional reports; audits.

(e) Each facility using aflatoxin binding agents must also have in its possession and provide on reasonable request a certificate indicating that the use of aflatoxin binding agents utilized in the formulation has been approved by the Service.

(f) Each facility must provide to the Service on request a record showing the name of the buyer, the amount of product sold to each buyer during the last two years, and the aflatoxin levels of grain, oilseeds, processed grain and oilseed meals containing aflatoxin B1, B2, G1, G2, and other records designated in subsection (d) of this section.

(g) Use of aflatoxin binders in non-customer-formula feeds is prohibited. Such use would result in an adulterated product within the meaning of §141.148, Distribution of Adulterated Feed of the Texas Commercial Feed Control Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100369
Tim Herrman
State Chemist and Director
Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist
Earliest possible date of adoption: March 13, 2011
For further information, please call: (979) 845-1121

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER P. APPROVAL OF DISTANCE EDUCATION COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §4.261

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §4.261, concerning Standards and Criteria for Distance Education Programs. The intent of the amendments to this section is to clarify the process by which previously approved doctoral programs at public institutions may be approved for distance delivery. Presently, any doctoral program wishing to be delivered by a distance education modality must receive Board approval prior to offering the program. The proposed changes will enable institutions approved to offer a doctoral program to do so via a distance education modality with the approval of the Commissioner or the Commissioner's designee.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of amending the section as proposed.

Dr. Stephenson has also determined that for the first five years the amendments are in effect, the public benefits anticipated as a result of administering the section will be to allow institutions to offer doctoral programs via distance education without obtaining a separate Board approval. This will result in institutions being able to more quickly respond to student needs. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed amendments may be submitted by mail to MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §61.051(j), which provides the Coordinating Board with the authority to approve courses for credit and distance education programs.

The amendments affect the Texas Education Code, Chapter 61, Subchapter C, §61.051(j).

§4.261. Standards and Criteria for Distance Education Programs.

The following provisions apply to all programs covered under this subchapter, unless otherwise specified:

(1) - (2) (No change.)

(3) [~~An institution shall not offer doctoral or first-professional degree programs by distance education without specific prior approval by the Board.~~] The Commissioner or the Commissioner's designee may approve for delivery by other delivery modes doctoral and special professional degree programs that have previously been approved by the Board [~~for electronic or off-campus delivery~~].

(4) - (7) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100391
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER Q. APPROVAL OF OFF-CAMPUS AND SELF-SUPPORTING COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §4.275

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §4.275, concerning Standards and Criteria for Off-Campus and Self-Supporting Programs. The intent of the amendments to this section is to clarify the process by which previously approved doctoral programs at public insti-

tutions of higher education may be approved for distance delivery. Presently, any doctoral program wishing to be delivered by a distance education modality must receive Board approval prior to offering the program. The proposed changes will enable institutions approved to offer a doctoral program to do so via a distance education modality with the approval of the Commissioner or the Commissioner's designee.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of amending the section as proposed.

Dr. Stephenson has also determined that for the first five years the amendments are in effect, the public benefits anticipated as a result of administering the section will be to allow institutions to offer doctoral programs via a distance education modality without obtaining a separate Board approval. This will result in institutions being able to more quickly respond to student needs. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed amendments may be submitted by mail to MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, Chapter 61, Subchapter C, §61.051(j), which provides the Coordinating Board with the authority to approve courses for credit and distance education programs, including off-campus and self-supporting programs.

The amendments affect the Texas Education Code, Chapter 61, Subchapter C, §61.051(j).

§4.275. Standards and Criteria for Off-Campus and Self-Supporting Programs.

The following provisions apply to all programs covered under this subchapter, unless otherwise specified:

(1) - (2) (No change.)

(3) [~~An institution shall not offer doctoral or first-professional degree programs off-campus or as a self-supporting program without specific prior approval by the Board.~~] The Commissioner or the Commissioner's designee may approve for delivery by other modes doctoral and special professional degree programs that have previously been approved by the Board [~~for delivery through off-campus instruction or as a self-supporting program~~].

(4) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100392
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES AND HEALTH-RELATED INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER C. APPROVAL OF NEW ACADEMIC PROGRAMS AND ADMINISTRATIVE CHANGES AT PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND REVIEW OF EXISTING DEGREE PROGRAMS

19 TAC §§5.43, 5.44, 5.52

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§5.43, 5.44, and 5.52, concerning Approval of New Academic Programs and Administrative Changes at Public Universities, Health-Related Institutions, and Review of Existing Degree Programs.

Specifically, the proposed amendments to §5.43 would create definitions for terms related to the implementation of new degree programs and the review of existing programs. Section 5.44 would add a condition for the automatic approval of new bachelor's programs specifying that the minimum number of semester credit hours required to complete the program would not be greater than 120. The proposed amendments also state that if an institution proposes a bachelor's program requiring more than 120 semester credit hours, the institution must provide detailed written documentation regarding programmatic accreditation requirements, statutory requirements, or licensure/certification requirements that cannot be met without exceeding the 120-hour limit. The proposed amendments to §5.52 add requirements for the periodic evaluation of master's and doctoral programs at public universities and health-related institutions.

Dr. MacGregor Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Stephenson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering §5.43 and §5.44 will be the assurance of the most cost-efficient pathway to completion of a bachelor's degree, for both the state and the student. The public benefit anticipated as a result of administering §5.52 will be the regular evaluation and improvement of graduate programs at public institutions in Texas. There will be no effect on small businesses. There will be no anticipated economic costs to persons who are required to comply with the sections as proposed. There will be no impact on local employment.

Comments on the proposal may be submitted by mail to Dr. MacGregor Stephenson, Assistant Commissioner for Academic Affairs and Research, Texas Higher Education Coordinating Board, 1200 E. Anderson Lane, Austin, Texas 78752 or by email to macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §61.051(e), which provides that the Coordinating Board shall review all degree programs offered by public institutions of higher education to assure that they meet the present and future needs of the state that no new departments, school, degree program, or certificate program may be added at any public institution of higher education except with specific prior approval of the Coordinating Board.

The amendments affect Texas Education Code, §61.051(e).

§5.43. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) - (3) (No change.)

(4) Certificate Program--Any grouping of subject-matter courses which, when satisfactorily completed by a student, shall entitle him to a certificate or documentary evidence, other than a degree, of completion of a post-secondary course of study at a university or health-related institution.

(5) [~~(4)~~] Commissioner--The Commissioner of Higher Education.

[~~(5) Certificate Program--Any grouping of subject-matter courses which, when satisfactorily completed by a student, shall entitle him to a certificate or documentary evidence, other than a degree, of completion of a post-secondary course of study at a university or health-related institution.~~]

(6) Compelling Academic Reason--A justification for an undergraduate degree program consisting of more than 120 semester credit hours. Acceptable justifications are programmatic accreditation requirements, statutory requirements, and requirements for licensure/certification of graduates.

(7) [~~(6)~~] Degree program--Any grouping of subject matter courses which, when satisfactorily completed by a student, shall entitle him or her to a degree from a public university or health-related institution

(8) Doctoral Graduation Rate--The Doctoral Graduation Rate is the percent of students in an entering fall cohort for a specific degree program who graduate within 10 years. Doctoral graduation rates do not include students who received a master's degree.

(9) Faculty publications--Discipline-related refereed publications, books or book chapters, juried creative or performance accomplishments, and notices of discoveries filed and patents issued.

(10) Faculty teaching load--Total number of semester credit hours taught per academic year by faculty divided by the number of faculty.

(11) [~~(7)~~] Graduate-level certificate program--A certificate program at a university or health-related institution that consists primarily of graduate-level courses.

(12) Graduate placement--The number and percent of graduates employed or engaged in further education or training, those still seeking employment, and unknown.

(13) [~~(8)~~] Lower-division degree or certificate program--A degree or certificate program offered at a university or health-related institution that consists of lower-division courses and is equivalent to a program offered at a community or technical college.

(14) Master's Graduation Rate--The Master's Graduation Rate is the percent of students in an entering fall and spring cohort for a specific degree program who graduate within 5 years.

(15) [~~(9)~~] New Doctoral Degree Program--A doctoral degree program that has been approved by the Coordinating Board for a period of less than five years.

(16) [~~(10)~~] Selected Public Colleges--Those public colleges authorized to offer baccalaureate degrees in Texas.

(17) Student time-to-degree--The average of the number of semesters taken by program graduates from the time of enrollment in the program until graduation.

(18) [~~(11)~~] Upper-division certificate program--A certificate program at a university or health-related institution that consists primarily of upper-division undergraduate courses.

§5.44. Presentation of Requests and Steps for Implementation.

(a) Requests for new degree programs shall be made in accordance with the following procedures.

(1) - (2) (No change.)

(3) If the minimum number of semester credit hours required to complete a proposed bachelor's program exceeds 120, the institution must provide detailed written documentation describing the compelling academic reason for the number of required hours, such as programmatic accreditation requirements, statutory requirements, or licensure/certification requirements that cannot be met without exceeding the 120-hour limit. The Coordinating Board will review the documentation provided and make a determination to approve or deny a request to exceed the 120-hour limit.

(4) [~~(3)~~] The Coordinating Board shall post the proposed program online for public comment for a period of 30 days. If no objections occur, the Coordinating Board staff shall update the institution's program inventory accordingly. No new program shall be implemented until all objections are resolved. The Coordinating Board reserves the right to audit a certificate or degree program at any time to ensure compliance with any of the criteria outlined in paragraph (1) of this subsection.

(5) [~~(4)~~] An institution requesting a new doctoral program shall submit a proposal using the standard doctoral program request form. All requests for new doctoral programs require preliminary authority prior to the submission of a degree program request.

(b) - (c) (No change.)

§5.52. Review [~~Assessment~~] of Existing Degree Programs.

(a) - (b) (No change.)

(c) Each public university and health-related institution shall review all doctoral programs at least once every seven years.

(1) On a schedule to be determined by the Commissioner, institutions shall submit a schedule of review for all doctoral programs to the Assistant Commissioner of Academic Affairs and Research.

(2) Institutions shall begin each review of a doctoral program with a rigorous self-study.

(3) As part of the required review process, institutions shall use at least two external reviewers with subject-matter expertise who are employed by institutions of higher education outside of Texas.

(4) External reviewers must be provided with the materials and products of the self-study and must be brought to the campus for an on-site review.

(5) External reviewers must be part of a program that is nationally recognized for excellence in the discipline.

(6) External reviewers must affirm that they have no conflict of interest related to the program under review.

(7) Closely-related programs, defined as sharing the same 4-digit Classification of Instructional Programs code, may be reviewed in a consolidated manner at the discretion of the institution.

(8) Institutions shall review master's and doctoral programs in the same discipline simultaneously, using the same self-study materials and reviewers. Institutions may also, at their discretion, review bachelor's programs in the same discipline as master's and doctoral programs simultaneously.

(9) Criteria for the review of doctoral programs must include, but are not limited to:

(A) The 18 Characteristics of Texas Doctoral Programs;

(B) Student retention rates;

(C) Student enrollment;

(D) Graduate licensure rates (if applicable);

(E) Alignment of program with stated program and institutional goals and purposes;

(F) Program curriculum and duration in comparison to peer programs;

(G) Program facilities and equipment;

(H) Program finance and resources; and

(I) Program administration.

(10) Institutions shall submit a report on the outcomes of each review, including the evaluation of the external reviewers and actions the institution has taken or will take to improve the program, and shall deliver these reports to the Academic Affairs and Research Division no later than 90 days after the reviewers have submitted their findings to the institution.

(d) Each public university and health-related institution shall review all stand-alone master's programs at least once every seven years.

(1) On a schedule to be determined by the Commissioner, institutions shall submit a schedule of review for all master's programs to the Assistant Commissioner of Academic Affairs and Research.

(2) Institutions shall begin each review of a master's program with a rigorous self-study.

(3) As part of the required review process, institutions shall use at least one external reviewer with subject-matter expertise who is employed by an institution of higher education outside of Texas.

(4) External reviewers shall be provided with the materials and products of the self-study. External reviewers may be brought to the campus for an on-site review or may be asked to conduct a remote desk review.

(5) External reviewers must be part of a program that is nationally recognized for excellence in the discipline.

(6) External reviewers must affirm that they have no conflict of interest related to the program under review.

(7) Closely-related programs, defined as sharing the same 4-digit Classification of Instructional Programs code, may be reviewed in a consolidated manner at the discretion of the institution.

(8) Master's programs in the same 6-digit Classification of Instructional Programs code as doctoral programs shall be reviewed simultaneously with their related doctoral programs.

(9) Criteria for the review of master's programs must include, but are not limited to:

(A) Faculty qualifications;

(B) Faculty publications;

(C) Faculty external grants;

(D) Faculty teaching load;

(E) Faculty/student ratio;

(F) Student demographics;

(G) Student time-to-degree;

(H) Student publication and awards;

(I) Student retention rates;

(J) Student graduation rates;

(K) Student enrollment;

(L) Graduate licensure rates (if applicable);

(M) Graduate placement (i.e. employment or further education/training);

(N) Number of degrees conferred annually;

(O) Alignment of program with stated program and institutional goals and purposes;

(P) Program curriculum and duration in comparison to peer programs;

(Q) Program facilities and equipment;

(R) Program finance and resources; and

(S) Program administration.

(10) Institutions shall submit a report of the outcomes of each review, including the evaluation of the external reviewer(s) and actions the institution has taken or will take to improve the program, and shall deliver these reports to the Academic Affairs and Research Division no later than 90 days after the reviewer(s) have submitted their findings to the institution.

(e) The Coordinating Board shall review all reports submitted for master's and doctoral programs and shall conduct analysis as necessary to ensure high quality. Institutions may be required to take additional actions to improve their programs as a result of Coordinating Board review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100393
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES
SUBCHAPTER A. DEFINITIONS

19 TAC §9.1

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §9.1, concerning Definitions, for the purpose of permitting public two-year colleges to award an academic certificate to students who complete fifty percent of the curriculum specified in a voluntary transfer compact.

Dr. MacGregor Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the amended rule is in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amended rule.

Dr. Stephenson has also determined that for each year of the first five years the amended rule is in effect, the public benefit would be the establishment of students' eligibility to receive an academic certificate for completing fifty percent of the curriculum specified in a voluntary transfer compact at a public two-year college. There would be no impact on small businesses nor any adverse impact on local employment. Colleges may currently award academic certificates under the provisions of §9.185. The institutional cost of awarding additional certificates pursuant to the amended rule would be minimal.

Comments on the proposed rule amendments may be submitted to MacGregor Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the provisions of Texas Education Code, Chapter 61, Subchapter C, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The proposed amendment affects Texas Education Code, Chapter 61, Subchapter C.

§9.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (26) (No change.)

(27) Voluntary transfer compact [~~Statewide Articulated Transfer Curriculum~~]--A set of courses, up to the level of an academic associate degree, that will satisfy the lower-division requirements of a baccalaureate degree in a specific discipline. A voluntary transfer compact [~~statewide articulated transfer curriculum~~] must:

(A) have the same rigor and content as the equivalent course work in the baccalaureate program offered at a general academic teaching institution;

(B) minimize the time and course work required to complete a baccalaureate degree;

(C) be consistent with the common course numbering system approved by the Board and the recommendations and rules of the Board; and

(D) include only course work directly applicable to the requirements of the baccalaureate degree program(s) with which it is associated.

(28) - (33) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100394
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER J. ACADEMIC ASSOCIATE DEGREE AND CERTIFICATE PROGRAMS

19 TAC §9.183, §9.185

The Texas Higher Education Coordinating Board (Coordinating Board) proposes to amend §9.183 and §9.185, concerning Academic Associate Degree and Certificate Programs, for the purpose of permitting public two-year colleges to award an academic certificate to students who complete fifty percent of the curriculum specified in a voluntary transfer compact.

Dr. MacGregor Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the amended rule is in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amended rule.

Dr. Stephenson has also determined that for each year of the first five years the amended rule is in effect, the public benefit would be the establishment of students' eligibility to receive an academic certificate for completing fifty percent of the curriculum specified in a voluntary transfer compact at a public two-year college. There would be no impact on small businesses nor any adverse impact on local employment. Colleges may currently award academic certificates under the provisions of §9.185. The institutional cost of awarding additional certificates pursuant to the amended rule would be minimal.

Comments on the proposed amendments may be submitted to MacGregor Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the provisions of Texas Education Code, Chapter 61, Subchapter C, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The proposed amendments affect Texas Education Code, Chapter 61, Subchapter C.

§9.183. Degree Titles, Program Length, and Program Content.

(a) - (b) (No change.)

(c) Except as provided in paragraphs (1), (2), and (3) of this subsection, academic associate degree programs must incorporate the institution's approved core curriculum as prescribed by §4.28 of this title (relating to Core Curriculum) and §4.29 of this title (relating to Core Curricula Larger than 42 Semester Credit Hours).

(1) A college may offer a specialized academic associate degree that incorporates a Board-approved field of study curriculum as prescribed by §4.32 of this title (relating to Field of Study Curricula) and a portion of the college's approved core curriculum if the coursework for both would total more than 66 SCH; or

(2) A college may offer a specialized academic associate degree that incorporates a voluntary transfer compact [~~Board-approved statewide articulated transfer curriculum~~] and a portion of the college's approved core curriculum if the coursework for both would total more than 66 SCH.

(3) A college that has a signed articulation agreement with a General Academic Teaching Institution to transfer a specified curriculum may offer a specialized AA or AS (but not AAT) degree program that incorporates that curriculum.

§9.185. Academic Certificates.

A college may award an academic certificate to a student who completes:

(1) - (2) (No change.)

(3) fifty percent of the curriculum specified in a voluntary transfer compact. [~~a Board-approved statewide articulated transfer curriculum of less than degree length.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100395
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER S. PROFESSIONAL NURSING SHORTAGE REDUCTION PROGRAM

19 TAC §22.508

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §22.508, concerning rules applying to the Professional Nursing Shortage Reduction Program. The language regarding when an audit report is due has been changed to reflect that the report is due after all funds from the award in question have been expended. This change is necessary since award expenditures may cover more than one fiscal year.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of amending the section will be minimal. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner, Planning and Accountability, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §61.9624 which provides the Coordinating Board with the authority to adopt rules for the administration of the Professional Nursing Shortage Reduction Program.

The amendments affect Texas Education Code, §61.9624.

§22.508. Expenditure Restrictions, Accounting Requirements, and Audit Provisions.

(a) - (b) (No change.)

(c) Audit Provisions--Any awards made under this program or data submitted under this program are subject to audit by internal and/or external auditors, including Coordinating Board staff. Institutions that receive an award of $500,000 or more shall submit an independent audit report for that award to the Coordinating Board within six months after the end of the [~~award~~] fiscal year in which that award's funds have completely been expended. Institutions that receive an award of less than $500,000 shall have their internal auditor include the award as a part of its annual risk assessment for audit review. If the award is selected for further review, the internal auditor shall provide the Coordinating Board a copy of its audit report. Audits should determine if awards were expended in compliance with allowable award expenditures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100396
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 28, 2011
For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.4

Introduction. The Texas Board of Nursing (Board) proposes amendments to §217.4 (relating to Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction). These amendments are proposed under the Occupations Code §§301.251, 301.252, and 301.151 and are necessary to specify an exception to the Board's licensure requirements for qualified international nurse applicants.

Existing §217.4 requires international nurse applicants for initial licensure by examination to achieve an approved score on an English proficiency test acceptable to the Board. This requirement was designed to ensure that non-native English speaking international nurse applicants possess the requisite reading, writing, listening, and speaking skills necessary to competently and safely practice nursing in this state. Although it has been the Board's long-standing practice to routinely exempt international nurse applicants from this requirement if the applicant could show that he/she completed a nursing program of study that was substantially conducted in the English language, the existing rule does not reflect this exception. The Board considered the proposed amendments at its January 2011, meeting, and voted to formalize its historical practice in rule.

The Board is charged with protecting the health, safety, and welfare of the public. One way in which the Board fulfills this obligation is by regulating the licensure of nursing applicants. The Board has established various licensing requirements that a nursing applicant must meet in order to take the National Council Licensing Examination (NCLEX) and subsequently become licensed as a nurse in this state. These requirements include the completion of a licensure application, nursing program of study, and background check and the resolution of any outstanding eligibility issues. In addition to these requirements, international nurse applicants must also achieve an approved score on an English proficiency test. An English proficiency test is designed to evaluate whether an individual possesses the skills necessary to read, write, and communicate effectively in the English language. Such skills are instrumental to a nursing applicant's ability to achieve a passing score on the NCLEX, which is only available in English, and upon licensure, to provide effective nursing care to patients and the public. A licensed nurse must be able to listen and respond to instructions in English; to understand policies, procedures, and medication and treatment orders that are written in English, and to write and speak fluently in the English language so that others, such as health care providers and patients, can comfortably communicate with the nurse. These concerns are lessened, however, when an international nurse applicant's nursing program of study has been substantially conducted in the English language. In such situations, an international nurse applicants' books may be printed in English; an applicant may attend lectures that are conducted in English; an applicant may be required to submit written coursework in English; an applicant's examinations may be conducted in English; and an applicant's clinical experiences may require verbal and written communications in English. In these cases, an individuals' proficiency in the English language has been effectively evaluated throughout the duration of the nursing program of study. Because there is no need to re-test the individual's proficiency in the English language as part of the licensure process, the Board has historically exempted qualified international nurse applicants from this requirement. The proposed amendments are designed to formalize this exception and to eliminate an unnecessary barrier to licensure for qualified international nurse applicants.

Section-by-Section Overview. The following is a section-by-section overview of the proposal.

Proposed amended §217.4(a)(1)(C) provides that a licensed vocational nurse applicant must have achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

Proposed amended §217.4(a)(2)(E) provides that a registered nurse applicant must provide a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF) and an English proficiency test acceptable to the Board, or the equivalent which verifies that the applicant has achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

FISCAL NOTE. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of requirements that eliminate an unnecessary barrier to licensure for qualified international nurse applicants. Currently, the Board requires international nurse applicants to achieve a passing score on an approved English proficiency test in order to become licensed as a nurse in this state. The Board, however, has historically exempted an applicant from this requirement if the applicant's nursing program of study was substantially conducted in English. Such applicants have already demonstrated their proficiency in the English language by successfully completing a nursing program of study substantially conducted in English. As such, the proposed amendments eliminate a redundant licensing requirement for these applicants. In doing so, these applicants will not be required to incur the costs associated with preparing for and taking an approved English proficiency test. Further, these applicants should receive their nursing license in a more timely and efficient manner, as they will not have to expend the additional time and resources in preparing for and taking an English proficiency test. Finally, there is no threat of harm or danger to the public safety, as these applicants have already demonstrated their proficiency in the English language by successfully completing a nursing program of study substantially conducted in English.

There are no anticipated economic costs to individuals who are required to comply with the proposed amendments. The proposed amendments do not impose new or additional requirements or restrictions upon individuals required to comply with the proposal. Rather, the proposed amendments provide a cost saving exception for qualified international nurse applicants by eliminating a redundant and unnecessary requirement for licensure. Under the proposed amendments, international nurse applicants who complete a qualifying nursing program of study will not have to take and pass an English proficiency test. As a result, certain international nurse applicants will not have to incur the costs associated with taking and passing an English proficiency test.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because (i) no small or micro business, as defined by the Government Code §2006.001(1) and (2), is required to comply with the proposal; and (ii) there are no anticipated economic costs to any individual who is required to comply with the proposal.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on March 14, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Mark Majek, Director of Operations, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to mark.majek@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed under the Occupations Code §§301.251, 301.252, and 301.151.

Section 301.251(a) provides that a person may not practice or offer to practice professional nursing or vocational nursing in this state unless the person is licensed as provided by Chapter 301.

Section 301.251(b) states that, unless the person holds a license under Chapter 301, a person may not use, in connection with the person's name: (i) the title "Registered Nurse"; "Professional Nurse"; "Licensed Vocational Nurse"; "Vocational Nurse"; "Licensed Practical Nurse"; "Practical Nurse"; or "Graduate Nurse"; (ii) the abbreviation "R.N.", "L.V.N.", "V.N.", "L.P.N.", or "P.N."; or (iii) any other designation tending to imply that the person is a licensed registered nurse or vocational nurse.

Section 301.251(c) provides that §301.251 does not apply to a person entitled to practice nursing in this state under Chapter 304.

Section 301.251(d) states that, unless the person holds a license under Chapter 301, a person may not use, in connection with the person's name: (i) the title "nurse"; or (ii) any other designation tending to imply that the person is licensed to provide nursing care.

Section 301.252(a) provides that each applicant for a registered nurse license or a vocational nurse license must submit to the Board a sworn application that demonstrates the applicant's qualifications under Chapter 301, accompanied by evidence that the applicant: (i) has good professional character; (ii) has successfully completed a program of professional or vocational nursing education approved under §301.157(d); and (iii) has passed the jurisprudence examination approved by the Board as provided by §301.252(a-1).

Section 301.252(a-1) provides that the jurisprudence examination shall be conducted on the licensing requirements under Chapter 301 and Board rules and other laws, rules, or regulations applicable to the nursing profession in this state. Further, the Board shall adopt rules for the jurisprudence examination under §301.252(a)(3) regarding: (i) the development of the examination; (ii) applicable fees; (iii) administration of the examination; (iv) reexamination procedures; (v) grading procedures; and (vi) notice of results.

Section 301.252(b) provides that the Board may waive the requirement of §301.252(a)(2) for a vocational nurse applicant if the applicant provides satisfactory sworn evidence that the applicant has completed an acceptable level of education in: (i) a professional nursing school approved under §301.157(d); or (ii) a school of professional nurse education located in another state or a foreign country.

Section 301.252(c) states that the Board by rule shall determine acceptable levels of education under §301.252(b).

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Occupations Code §§301.251, 301.252, and 301.151.

§217.4. Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction.

(a) Nurse applicants for initial licensure applying under this section.

(1) A licensed vocational nurse applicant must:

(A) hold a high school diploma issued by an accredited secondary school or equivalent educational credentials as established by the General Education Development Equivalency Test (GED);

(B) have successfully completed an approved program for educating vocational/practical (second level general nurses) nurses by providing a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF); and

(C) have achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

(2) A registered nurse applicant must provide a Credential Evaluation Service Full Education Course-by-Course Report from the Commission on Graduates of Foreign Nursing Schools (CGFNS), Educational Records Evaluation Service (ERES), or the International Education Research Foundation (IERF) and an English proficiency test acceptable to the Board, or the equivalent which verifies that the applicant:

(A) has the educational credentials equivalent to graduation from a governmentally accredited/approved, post-secondary general nursing program of at least two academic years in length;

(B) received both theory and clinical education in each of the following: nursing care of the adult which includes both medical and surgical nursing, maternal/infant nursing, nursing care of children, and psychiatric/mental health nursing;

(C) received initial registration/license as a first-level, general nurse in the country where the applicant completed general nursing education;

(D) is currently registered/licensed as a first-level general nurse; and

(E) has achieved an approved score on an English proficiency test acceptable to the Board, unless a substantial portion of the applicant's nursing program of study, as determined by the Board, was conducted in English.

(3) - (6) (No change.)

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 31, 2011.

TRD-201100389
Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 305-6822

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §537.45, §537.46

The Texas Real Estate Commission (TREC) proposes amendments to §537.45 concerning Standard Contract Form TREC No. 38-3, Notice of Buyer's Termination of Contract, and §537.46 concerning Standard Contract Form TREC No. 39-7, Amendment to Contract. The amendments propose to adopt by reference two revised contract forms for use by Texas real estate licensees.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendments to §537.45 propose to adopt by reference Standard Contract Form TREC No. 38-3, Notice of Buyer's Termination of Contract. Paragraph 2 of the notice would be amended to read: "(2) Buyer cannot obtain Credit Approval in accordance with the Third Party Financing Addendum for Credit Approval to the contract" to be consistent with a recent change to the title of TREC Form No. 40-4 Third Party Financing Condition Addendum for Credit Approval.

The amendments to §537.46 propose to adopt by reference Standard Contract Form TREC No. 39-7, Amendment to Contract. An admonishment would be added to Paragraph 3 of the form as follows: "(Note: Failure to deliver this amendment to escrow agent may affect the parties' rights to specific performance.)" to be consistent with recent changes to paragraph 15.B of the TREC contract forms.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the sections. There is no anticipated economic cost to persons who are required to comply with the proposed sections, other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be the availability of current standard contract forms.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1101; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapter 1101 and ensure compliance with Chapter 1101.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§537.45. Standard Contract Form TREC No. 38-3 [2].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 38-3 [2] approved by the Texas Real Estate Commission in 2011 [2008] for use as a notice of termination of contract. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.46. Standard Contract Form TREC No. 39-7 [6].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 39-7 [6] approved by the Texas Real Estate Commission in 2011 [2006] for use as an amendment to promulgated forms of contracts. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 24, 2011.

TRD-201100305
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 465-3926

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES
SUBCHAPTER J. OPERATIONAL CONTROLS FOR MOTOR VEHICLES
DIVISION 2. LOCALLY ENFORCED MOTOR VEHICLE IDLING LIMITATIONS

30 TAC §114.512, §114.517

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §114.512 and §114.517.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Chapter 114, Subchapter J, Division 2, Locally Enforced Motor Vehicle Idling Limitations, was adopted on November 17, 2004, at the request of the local air quality planning organization in the Austin Early Action Compact (EAC) area (Bastrop, Caldwell, Hays, Travis, and Williamson Counties) for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone National Ambient Air Quality Standards (NAAQS), as published in the December 3, 2004, issue of the *Texas Register* (29 TexReg 11347). The adopted idling limitations rules provided all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal 1997 eight-hour ozone standards.

The concept of an early, voluntary 1997 eight-hour air quality plan, also known as an EAC, was endorsed by EPA Region 6 in June 2002. It was slightly modified and made available nationally in November 2002. A key point of an EAC was the flexibility afforded areas to select emission reduction measures, such as limiting vehicle idling. On August 1, 2005, members of the Austin EAC and the commission signed the locally enforced idling restrictions memorandum of agreement (MOA). This MOA allowed participating counties and cities to enforce the idling restriction rule in their jurisdictions. Members of the Austin EAC area signing the MOA included the counties of Bastrop, Caldwell, Hays, Travis, and Williamson, and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. Idling restrictions are also a commitment for the Austin-Round Rock 1997 Eight-hour Ozone Flex signed in September 2008.

An additional 24 counties and cities in the Dallas-Fort Worth (DFW) area have also signed agreements to enforce the idling restriction rule in their jurisdictions including the counties of Collin, Kaufman, and Tarrant, the cities of Arlington, Benbrook, Celina, Colleyville, Dallas, Euless, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Richardson, Rowlett, University Park, and Venus, and the towns of Little Elm and Westlake. Idling restrictions are a commitment for the DFW Eight-hour Ozone SIP adopted May 23, 2007.

This proposed rulemaking would amend the rule on idling limits for gasoline and diesel-powered engines in motor vehicles within the jurisdiction of any local government in the state that has signed an MOA with the commission to delegate enforcement to that local government. Local enforcement is crucial to the effective implementation of rules to reduce the extended idling of gasoline and diesel-powered heavy-duty vehicles and will help to ensure the reduction of nitrogen oxides (NO_x) and volatile organic compound emissions, which is needed by local governments to achieve or maintain attainment of the federal ozone standards. These proposed idling restrictions will continue to lower NO_x emissions and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions.

The proposed rulemaking would remove the current enforcement period of April 1 through October 31 in the rule to allow local governments to enforce idling limits year-round. The enforcement dates were included when the rule was originally adopted at the request of the local air quality planning organization in the Austin EAC area for use as a control strategy in its EAC agreement to maintain attainment with the 1997 eight-hour ozone NAAQS. This same rulemaking also provided local governments in other areas of the state the option of applying these rules in their areas when additional control measures are needed to achieve or maintain attainment of the federal ozone standards in the future. When the rule was adopted in 2004, there were no federal regulations governing idle time for heavy-duty motor vehicles. Therefore, the state had the authority to control motor vehicle idling. The requirements developed by the commission for this NO_x emissions reduction strategy resulted in restrictions on the time allowed for heavy-duty motor vehicle idling. The 79th Legislature, 2005, passed House Bill (HB) 1540, establishing Texas Health and Safety Code (THSC), Chapter 382, Subchapter B, §382.0191, Idling of Motor Vehicle While Using Sleeper Berth, which prohibited the commission from restricting the idling of a motor vehicle while a driver is using the vehicle's sleeper berth for a government-mandated rest period. HB 1540 also restricted drivers using the vehicle's sleeper berth from idling in a school zone or within 1,000 feet of a public school during its hours of operation, and it defined the penalty for an offense as a fine not to exceed $500. HB 1540 did not specify an enforcement period, but it set a September 1, 2007, expiration date on the section. The commission adopted the revision on April 26, 2006, to the locally enforced motor vehicle idling rule as published in the May 12, 2006, issue of the *Texas Register* (31 TexReg 3900).

In the same rulemaking, the commission adopted revisions to the idling rule to conform to legislation passed in 2005. To be consistent with HB 1540, §114.512 and §114.517 were amended to include §114.512(b) and §114.517(12) with a September 1, 2007, expiration date. In May 2007, the 80th Legislature, 2007, passed Senate Bill (SB) 12, which in part amended THSC, §382.0191 to extend the prohibition on the commission from adopting rules restricting certain idling activities from September 1, 2007, to September 1, 2009, as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1345). Local governments can enforce idling restrictions on drivers who were previously exempt under §114.517(12), because the exemption expired on September 1, 2009. This proposed rulemaking would remove the September 1, 2009, expiration date from the relevant portions of §114.517 to continue the exemption. As of September 1, 2009, the prohibition in §114.512(b) of certain vehicles from idling within 1,000 feet of a school or hospital has expired. Therefore, this subsection is proposed to be removed.

During the rulemaking in 2007 to implement the requirements of SB 12, the commission adopted §114.517(2), the intent of which was to provide an exemption for all vehicles with gross vehicle

weight rating of 14,000 pounds or less until September 1, 2009, and thereafter only to such vehicles that do not have a sleeper berth. This proposed rulemaking would amend §114.517(2) to remove the duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009.

The National Armored Car Association submitted a petition for rulemaking on May 22, 2008, requesting that armored vehicles be added to the current list of idling restriction exemptions under §114.517. Staff received approval from the commission on July 9, 2008, to move forward with initiating rulemaking regarding the armored vehicle petition; however, following a stakeholder meeting held on October 6, 2008, action on a rulemaking proposal to implement the petition was deferred in anticipation of potential legislative changes from the 81st Legislature, 2009. This proposed rulemaking will address the armored vehicle petition by adding armored vehicles to the current list of idling restriction exemptions under §114.517 to be consistent with the EPA's Model State Idling Law guidance. According to the EPA's guidance, armored vehicles are exempt when a person remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded.

On April 9, 2010, the EPA published its approval of revisions to the SIP regarding the idling rule that the TCEQ submitted on February 28, 2008 (75 *Federal Register* 18061). In that approval, the EPA did not address the previous revisions to §114.512(b) prohibiting idling of a vehicle within a school zone or within 1,000 feet of a public school during operating hours and §114.517(12) exempting the idling of the primary propulsion engine of a vehicle to provide air conditioning and heating for the vehicle's sleeper berth for a government-mandated rest period, because these provisions of the rule had already expired.

Federal Clean Air Act, §110L Demonstration

Some increases in emissions may be expected due to the addition of an idling exemption for armored vehicles. However, the exemption will not interfere with attainment or reasonable further progress in the SIP, because the proposed year-round enforcement will offset these relatively small increases. Extending the enforcement period to year-round enforcement should provide more emissions reductions in the months that are currently not subject to enforcement. Thus, any potential increases resulting from an exemption for armored vehicles should be offset by these reductions. Additionally, by authorizing the enforcement to year-round, the state hopes to increase enforcement in the current ozone period by eliminating any drop off in enforcement that may occur due to the seasonal nature of the ozone enforcement period. An exemption for armored vehicles is necessary for the health and safety of the drivers and the public and outweighs dangers posed by any potential small increases in emissions.

SECTION BY SECTION DISCUSSION

§114.512, Control Requirements for Motor Vehicle Idling

The proposal would amend §114.512 to remove the enforcement period of April 1 through October 31 of each calendar year in subsection (a) to allow enforcement year-round. The proposal would also amend §114.512 to remove the prohibition for drivers using sleeper berths to idle in residential areas, school zones, and near hospitals and the expiration date in subsection (b) because it has expired. Additionally, the commission proposes to remove the designation (a) for subsection (a) to conform to the Texas Register formatting requirements.

§114.517, Exemptions

The proposal would amend §114.517 to remove the exemption in paragraph (2) for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, for consistency with other revisions in the section and to add a new exemption in paragraph (2) for armored vehicles to implement the petition approved by the commission on July 9, 2008. The proposal would also amend §114.517(12) to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rulemaking is in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rulemaking.

The proposed rulemaking would amend Chapter 114 to make the idling enforcement period year-round; to remove the exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009. In response to a petition filed by the National Armored Car Association, the proposed rulemaking would also exempt armored vehicles from motor vehicle idling requirements.

Participation in the idling program is voluntary and currently only the Central Texas Area (CTA) and the North Central Texas Area (NCTA) have signed agreements to implement vehicle idling rules. The CTA includes the counties of Bastrop, Caldwell, Hays, Travis, and Williamson and the cities of Austin, Bastrop, Georgetown, Hutto, Lockhart, Luling, Round Rock, and San Marcos. The NCTA includes the counties of Collin, Kaufman, and Tarrant, the cities of Arlington, Benbrook, Celina, Colleyville, Dallas, Euless, Hurst, Keene, Lake Worth, Lancaster, Mabank, McKinney, Mesquite, North Richland Hills, Pecan Hill, Rowlett, University Park, and Venue, and towns of Little Elm and Westlake. Participation in the vehicle idling program provides local governments with additional options to reduce emissions and maintain attainment with the federal ozone standards.

The proposed rulemaking is not expected to have a fiscal impact on local governments since participation in the vehicle idling program is voluntary. Currently, only local governments in counties included in the CTA and NCTA would be able to limit certain vehicle idling year-round under the proposed rules, as a tool in limiting emissions to meet the ozone standards. The proposed rulemaking would also exempt armored vehicles from the vehicle idling restrictions.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be in compliance with state law and the continued flexibility and options for local governments to enforce vehicle idling requirements as a method of reducing emissions in order to maintain attainment with the eight-hour ozone standards.

The proposed rulemaking is not expected to have a fiscal impact on individuals. The proposed rulemaking provides continued flexibility for local governments that have signed agreements with the agency concerning vehicle idling. The proposed rulemaking also exempts armored vehicles from vehicle idling restrictions.

Armored vehicle companies are typically large businesses, and the proposed rulemaking is not expected to have a significant fiscal impact on those companies. However, armored vehicles would be exempt from vehicle idling restrictions in areas that have signed an agreement with the agency, and exemption from those restrictions would provide extra security for armored vehicles and protect the health and safety of employees.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. The proposed rulemaking would provide continued flexibility for local governments that have signed agreements with the agency concerning vehicle idling. The proposed rulemaking would also exempt armored vehicles from vehicle idling restrictions.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required, because the proposed rulemaking is protective of human health and the environment and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rulemaking is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required, because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental rule" is, "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule which, "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Participation in the idling program is voluntary, and currently only the local governments in the CTA and the NCTA have signed agreements to implement vehicle idling rules. The affected idling limitations rules provide all local governments the option of applying the rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards.

The specific intent of the proposed rulemaking is to make the idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because while the specific intent of the proposed rulemaking is to protect the environment or reduce risks to human health from environmental exposure, as discussed previously in the FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The idling restrictions are effective only in certain areas of the state where an MOA between the TCEQ and the local government is in effect and only in certain defined areas within those limited areas. The proposed rulemaking is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

While the proposed rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ); *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is to make the current idling enforcement period year-round; to remove the existing duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less and does not have a sleeper; to exempt armored vehicles from motor vehicle idling requirements; and to retain the exemption of idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009. This proposal, therefore, does not exceed an express requirement of federal law. The amendments are needed to implement state law but do not exceed those new requirements. The proposed rulemaking does involve a compact (in particular, the Austin EAC), which is an agreement between the state and federal government to implement a state and federal program; however, the proposed amendments do not exceed the requirements of that compact. Finally, this proposed rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

This proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because, while the specific intent of the proposed rules are to protect the environment or reduce risks to human health from environmental exposure, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would it adversely affect in a material way the environment or the public health and safety of the state or a sector of the state. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set

by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. These proposed rules are not burdensome, restrictive, or limiting of rights to private real property because the proposed rulemaking regulates vehicle idling in certain limited areas. Furthermore, the proposed rulemaking would benefit the public by providing all local governments the option of applying the idling rules when additional control measures are needed to achieve or maintain attainment of the federal ozone standards. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code §§33.201 *et seq.,* and therefore, must be consistent with all applicable CMP goals and policies. The commission reviewed this proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed rulemaking will not affect any coastal natural resource areas. The CMP goals applicable to the proposed rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants would be authorized in those affected counties and it is possible that ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this proposed rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (40 CFR §501.32). This rulemaking proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS. This proposed rulemaking action complies with the CFR. Therefore, in compliance with 40 CFR §505.22(e), this proposed rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of these proposed rules would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rulemaking is consistent with these CMP goals and policies, and because these proposed rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Written comments on the consistency of this proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 1, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle, and in Fort Worth on March 3, 2011, at 2:00 p.m. in the Public Meeting Room, at the DFW TCEQ Region 4 Office located at 2309 Gravel Road. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-054-114-EN. The comment period closes March 11, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Nina Castillo, Air Quality Planning Section, (512) 239-4415.

STATUTORY AUTHORITY

The amendments are proposed under the authority of Texas Government Code, §2001.021, Petition for the Adoption of Rules, which authorizes an interested person to petition a state agency for the adoption of a rule. The amendments are proposed under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendments are also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; and THSC, §382.208, Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendments implement THSC, §§382.011, 382.012, 382.019, and 382.208.

§114.512. Control Requirements for Motor Vehicle Idling.

[~~(a)~~] No person shall cause, suffer, allow, or permit the primary propulsion engine of a motor vehicle to idle for more than five consecutive minutes when the motor vehicle, as defined in §114.510 of this title (relating to Definitions), is not in motion [~~during the period of April 1 through October 31 of each calendar year~~].

[~~(b) No driver using the vehicle's sleeper berth may idle the vehicle: in a residential area as defined by Local Government Code, §244.001, in a school zone, within 1,000 feet of a hospital, or within 1,000 feet of a public school during its hours of operation. An offense under this subsection may be punishable by a fine not to exceed $500. This subsection expires September 1, 2009.~~]

§114.517. Exemptions.

The provisions of §114.512 of this title (relating to Control Requirements for Motor Vehicle Idling) do not apply to:

(1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less [~~and does not have a sleeper berth~~];

(2) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety in an armored vehicle while the employee remains inside the vehicle to guard the contents or while the vehicle is being loaded or unloaded; [~~a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less, after September 1, 2009;~~]

(3) a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;

(4) a motor vehicle being used by the United States military, national guard, or reserve forces, or as an emergency or law enforcement motor vehicle;

(5) the primary propulsion engine of a motor vehicle providing a power source necessary for mechanical operation, other than propulsion, and/or passenger compartment heating, or air conditioning;

(6) the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes;

(7) the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield;

(8) the primary propulsion engine of a motor vehicle that is being used to supply heat or air conditioning necessary for passenger comfort and safety in vehicles intended for commercial or public passenger transportation, or passenger transit operations, in which case idling up to a maximum of 30 minutes is allowed;

(9) the primary propulsion engine of a motor vehicle being used to provide air conditioning or heating necessary for employee health or safety while the employee is using the vehicle to perform an essential job function related to roadway construction or maintenance;

(10) the primary propulsion engine of a motor vehicle being used as airport ground support equipment;

(11) the owner of a motor vehicle rented or leased to a person that operates the vehicle and is not employed by the owner; or

(12) a motor vehicle when idling is necessary to power a heater or air conditioner while a driver is using the vehicle's sleeper berth for a government-mandated rest period and is not within two miles of a facility offering external heating and air conditioning connections at a time when those connections are available. [~~This subsection expires September 1, 2009.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100378
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 239-2548

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CHAPTER 293. WATER DISTRICTS
SUBCHAPTER E. ISSUANCE OF BONDS

30 TAC §293.44

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §293.44.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On May 28, 2010, Paloma Lake Municipal Utility District (MUD) Number 1, Paloma Lake MUD Number 2, Parkside at Mayfield Ranch MUD, and Armbrust & Brown, L.L.P., on behalf of Greenhawe Water Control and Improvement District Number 2, Lakeside MUD Number 3, Moore's Crossing MUD, Travis County

MUD Number 4, Travis County MUD Number 7, Travis County MUD Number 9, West Williamson County MUD Number 1, and Williamson County Water Sewer Irrigation and Drainage District Number 3 (Petitioner) proposed an amendment to §293.44 to facilitate regionalization and cooperative planning among water districts and other local government entities by providing clear authorization in the TCEQ's rules to provide a mechanism for allowing the cost incurred by a district to construct or acquire capacity in regional water, wastewater and drainage facilities to be bonded or reimbursed so long as that cost did not exceed the cost the district would have incurred to construct the facilities required to provide the same service on its own. The Petitioner stated that the proposed amendment "would further be consistent with the state's policy, as set forth in Texas Water Code, §49.230 to encourage the development and use of integrated area-wide wastewater collection, treatment and disposal systems to serve the wastewater disposal needs of the citizens of the state whenever it is economically feasible and competitive to do so." The commission approved the petition during its July 28, 2010 agenda and directed the executive director to initiate rulemaking process. This proposed rulemaking is in response to that direction.

SECTION DISCUSSION

The commission proposes to amend §293.44, Special Considerations. The commission proposes to amend the rule by adding §293.44(a)(8)(D) to allow the commission, or executive director on behalf of the commission to approve bonds for oversized facilities serving areas outside the district if the district or a developer in the district has entered into an agreement with certain local government entities and the oversizing is more cost-effective than alternative facilities to serve the district only. The proposed amendment defines regional water or wastewater provider for the purpose of this subparagraph and specifies the information that must be provided by the applicant before the executive director will review the request. The proposed amendment is intended to facilitate cooperation and coordination between water districts for regional water, wastewater, or drainage facilities by allowing a district to fund the *pro rata* share of oversized facilities serving areas outside the district so long as it is the most cost-effective means of providing service. The proposed amendment may, depending on action by each district's board of directors, provide for a district to fund more than the existing rules allow. The commission proposes to amend §293.44 by revising references to "sewer" and "sewage" to refer instead to "wastewater," to reflect current terminology and maintain uniform usage. Additionally, the commission proposes to amend §293.44(b)(7) to correct a cross-reference to Chapter 291, Subchapter G, Certificates of Convenience and Necessity.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The agency received a petition to provide a mechanism for water districts to finance regional water, wastewater, and/or drainage facilities that can serve areas outside their district as long as the cost of doing so was not greater than building facilities that would serve only that district. The proposed rule amends Chapter 293 to allow water districts to finance the *pro rata* share of oversized water, wastewater, and/or drainage facilities serving areas outside the district if they make agreements with a municipality or a regional water or wastewater provider and if the financing of these regional facilities is more cost-effective than if the district provided facilities for the district alone. If water districts voluntarily enter into such an agreement, they will be required to submit documentation that demonstrates the cost-effectiveness of the agreement.

The proposed rule will affect water districts such as municipal utility districts, special utility districts, water control and improvement districts, fresh water supply districts, or other types of water districts. There are approximately 1,540 active water districts in the state, and all are local governmental entities. The proposed rule is not expected to have a significant fiscal impact on local government since water districts are not expected to enter into agreements for oversized facilities with municipalities or regional providers of water, wastewater, and/or drainage facilities unless, it is cost-effective for them to do so. Municipalities and regional water and/or wastewater providers are also not expected to enter into such agreements unless, it is cost-effective for them. The cost of building water, wastewater, and/or drainage facilities varies widely across the state and depends on the type and size of the facilities as well as construction costs at the time that such voluntary agreements are made.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect the public benefit anticipated from the proposed rule will be the cost-effective supply of water, wastewater, and/or drainage services.

Individuals residing in districts that, under current rule, have not financed the *pro rata* share of oversized water, wastewater, and/or drainage facilities serving areas outside the district may see an increase in costs as a result of the proposed rule. However, any cost increase would be offset by the benefit of having water, wastewater, and/or drainage infrastructure. Under the proposed rule a district's board of directors could only finance such facilities if it is more cost-effective than providing facilities serving the district alone. Individuals that have not yet purchased property are expected to benefit from the proposed rule since it allows more flexibility for development and may make more property available for purchase.

The proposed rule does not affect businesses that supply water, wastewater, and/or drainage facilities. Land developers are expected to receive reimbursement for infrastructure that is not allowed under current rule. The proposed rule is expected to allow developers to sell property more quickly if their land is in a water district where it is cost-effective to enter into an agreement to finance construction of regional, oversized facilities by a municipality or regional water and/or wastewater provider. The fiscal benefit for a land developer will depend on market conditions and can vary widely across the state.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Water districts, municipalities, and regional providers of water and/or wastewater will have an additional option when financing the development of water, wastewater, and/or drainage facilities. Small businesses that are customers of a district may see costs increase if districts are not currently financing the *pro rata* share of regional infrastructure. However, any cost increase would be offset by the benefit of having water, wastewater, and/or drainage infrastructure. Under the proposed rule a district's board of direc-

tors could only finance such facilities if it is more cost-effective than providing facilities serving the district alone. Land developers may benefit from the proposed rule if voluntary agreements for oversized water, wastewater, and/or drainage facilities allow them to develop land more quickly. The fiscal benefit for a land developer will depend on market conditions and can vary widely across the state.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that it is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that it is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of this rule is to provide clear authorization in the TCEQ's rules for a determination of a district's allowable cost participation for oversized facilities serving areas outside the district based on a cost-benefit analysis. The rule is not required by federal regulations.

The proposed amendment to Chapter 293 authorizes the executive director to approve bonds for oversized facilities serving areas outside the district if the district or a developer in the district has entered into an agreement with certain local government entities and the oversizing is more cost-effective than alternative facilities to serve the district only. Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the proposed amendment will be significant with respect to the economy as a whole; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for treatment of water used in public water systems and is specifically required by state law; 2) does not exceed the requirements of state law under Texas Water Commission (TWC), Chapter 49, Subchapter F; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on treatment of water used in public water systems, but rather is proposed to provide clear authorization under state law for the approval of bonds in certain circumstances; and 4) is not proposed solely under the general powers of the agency, but rather specifically under TWC, §12.081, which allows the commission to issue rules necessary to supervise districts and authorities. Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. The commission invites public comment regarding this draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendment to Chapter 293 and performed a preliminary assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the proposed amendment is to clarify the executive director's authority in approving bonds in certain circumstances and to further the state's regionalization policy.

Promulgation of the proposed amendment would constitute neither a statutory nor a constitutional taking of private real property. There is no burden imposed on private real property under this rule because the proposed amendment neither relates to, nor has any impact on the use or enjoyment of private real property, and there would be no reduction in property value as a result of this rule. The proposed rule allows the district to reimburse a developer through bonds for oversized facilities serving areas outside the district if the district or a developer has entered into an agreement with certain types of local government entities.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 8, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-050-293-OW. The comment period closes March 14, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Gregory Charles, Water Supply Division, Utilities and Districts Section, at (512) 239-4638.

STATUTORY AUTHORITY

The amendment is proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state; and §12.081, which provides the commission authority to issue rules necessary to supervise districts and authorities created under Article III, §52, and Article XVI, §59, of the Texas Constitution.

The proposed amendment implements TWC, §5.103 and §12.081.

§293.44. Special Considerations.

(a) Developer projects. The following provisions shall apply unless the commission, in its discretion, determines that application to a particular situation renders an inequitable result.

(1) A developer project is a district project that provides water, wastewater, drainage, or recreational facility service for property owned by a developer of property in the district, as defined by Texas Water Code (TWC), §49.052(d).

(2) Except as permitted under paragraph (8) of this subsection, the costs of joint facilities that benefit the district and others should be shared on the basis of benefits received. Generally, the benefits are the design capacities in the joint facilities for each participant. Proposed cost sharing for conveyance facilities should account for both flow and inflow locations.

(3) The cost of clearing and grubbing of district facilities' easements that will also be used for other facilities that are not eligible for district expenditures, such as roads, gas lines, telephone lines, etc., should be shared equally by the district and the developer, except where unusually wide road or street rights-of-way or other unusual circumstances are present, as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title (relating to Thirty Percent of District Construction Costs to be Paid by Developer). The applicability of the competitive bidding statutes and/or regulations for clearing and grubbing contracts let and awarded in the developer's name shall not apply when the amount of the estimated district share, including any required developer contribution does not exceed 50% of the total construction contract costs.

(4) A district may finance the cost of spreading and compacting of fill in areas that require the fill for development purposes, such as in abandoned ditches or floodplain areas, only to the extent necessary to dispose of the spoil material (fill) generated by other projects of the district.

(5) The cost of any clearing and grubbing in areas where fill is to be placed should not be paid by the district, unless the district can demonstrate a net savings in the costs of disposal of excavated materials when compared to the estimated costs of disposal off site.

(6) When a developer changes the plan of development requiring the abandonment or relocation of existing facilities, the district may pay the cost of either the abandoned facilities or the cost of replacement facilities, but not both.

(7) When a developer changes the plan of development requiring the redesign of facilities that have been designed, but not constructed, the district may pay the cost of the original design or the cost of the redesign, but not both.

(8) A district shall not finance the pro rata share of oversized water, wastewater [~~sewer~~], or drainage facilities to serve areas outside the district unless:

(A) such oversizing:

(i) is required by or represents the minimum approvable design sizes prescribed by local governments or other regulatory agencies for such applications;

(ii) does not benefit out-of-district land owned by the developer;

(iii) does not benefit out-of-district land currently being developed by others; and

(iv) the district agrees to use its best efforts to recover such costs if a future user outside the district desires to use such capacity; or

(B) the district has entered into an agreement with the party being served by such oversized capacity that provides adequate payment to the district to pay the cost of financing, operating, and maintaining such oversized capacity; or

(C) the district has entered into an agreement with the party to be served or benefitted in the future by such oversized capacity, which provides for contemporaneous payment by such future user of the incremental increase in construction and engineering costs attributable to such oversizing and which, until the costs of financing, construction, operation, and maintenance of such oversized facilities are prorated according to paragraph (2) of this subsection, provides that:

(i) the capacity or usage rights of such future user shall be restricted to the design flow or capacity of such oversized facilities multiplied by the fractional engineering and construction costs contemporaneously paid by such future user; and

(ii) such future user shall pay directly allocable operation and maintenance costs proportionate to such restricted capacity or usage rights; or[.]

(D) the district or a developer in the district has entered into an agreement with a municipality or regional water or wastewater provider regarding the oversized facilities and such oversizing is more cost-effective than alternative facilities to serve the district only. For the purposes of this subparagraph, regional water or wastewater provider means a provider that serves land in more than one county. An applicant requesting approval under this subparagraph must provide:

(i) bid documents or an engineer's sealed estimate of probable costs of alternatives that meet minimum acceptable standards based on costs prevailing at the time the facilities were constructed; or

(ii) an engineering feasibility analysis outlining the service alternatives considered at the time the decision to participate in the oversizing was made; or

(iii) any other information requested by the executive director.

(9) Railroad, pipeline, or underground utility relocations that are needed because of road crossings should not be financed by the district; however, if such relocations result from a simultaneous district project and road crossing project, then such relocation costs should be shared equally. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(10) Engineering studies, such as topographic surveys, soil studies, fault studies, boundary surveys, etc., that contain information that will be used both for district purposes and for other purposes, such as roadway design, foundation design, land purchases, etc., should be shared equally by the district and the developer, unless unusual circumstances are present as determined by the commission. The district's share of such costs is further subject to any required developer contribution under §293.47 of this title.

(11) Land planning, zoning, and development planning costs should not be paid by the district, except for conceptual land-use plans required to be filed with a city as a condition for city consent to creation of the district.

(12) The cost of constructing lakes or other facilities that are part of the developer's amenities package should not typically be paid by the district; however, the costs for the portion of an amenity lake considered a recreational facility under paragraph (24) of this subsection may be funded by the district. The cost of combined lake and detention facilities should be shared with the developer on the basis of the volume attributable to each use, and land costs should be shared on the same basis, unless the district can demonstrate a net savings in the cost of securing fill and construction materials from such lake or detention facilities, when compared to the costs of securing such fill or construction materials off site for another eligible project.

(13) Bridge and culvert crossings shall be financed in accordance with the following provisions.

(A) The costs of bridge and culvert crossings needed to accommodate the development's road system shall not be financed by a district, unless such crossing consists of one or more culverts with a combined cross-sectional area of not more than nine square feet. The district's share shall be subject to the developer's 30% contribution as may be required by §293.47 of this title.

(B) Districts may fund the costs of bridge and culvert crossings needed to accommodate the development's road system that are larger than those specified in subparagraph (A) of this paragraph, which cross channels other than natural waterways with defined bed and banks and are necessary as a result of required channel improvements subject to the following limitations:

(i) the drainage channel construction or renovation must benefit property within the district's boundaries;

(ii) the costs shall not exceed a pro rata share based on the percent of total drainage area of the channel crossed, measured at the point of crossing, calculated by taking the total cost of such bridge or culvert crossing multiplied by a fraction, the numerator of which is the total drainage area located within the district upstream of the crossing, and the denominator of which is the total drainage area upstream of the crossing; and

(iii) the district shall be responsible for not more than 50% of the pro rata share as calculated under this subsection, subject to the developer's 30% contribution as may be required by §293.47 of this title.

(C) The cost of replacement of existing bridges and culverts not constructed or installed by the developer, or the cost of new bridges and culverts across existing roads not financed or constructed by the developer, may be financed by the district, except that any costs of increasing the traffic-carrying capacity of bridges or culverts shall not be financed by the district.

(14) In evaluating district construction projects, including those described in paragraphs (1) - (12) of this subsection, primary consideration shall be given to engineering feasibility and whether the project has been designed in accordance with good engineering practices, notwithstanding that other acceptable or less costly engineering alternatives may exist.

(15) Bond issue proceeds will not be used to pay or reimburse consultant fees for the following:

(A) special or investigative reports for projects which, for any reason, have not been constructed and, in all probability, will not be constructed;

(B) fees for bond issue reports for bond issues consisting primarily of developer reimbursables and approved by the commission but which are no longer proposed to be issued;

(C) fees for completed projects which are not and will not be of benefit to the district; or

(D) provided, however, that the limitations shall not apply to regional projects or special or investigative reports necessary to properly evaluate the feasibility of alternative district projects.

(16) Bond funds may be used to finance costs and expenses necessarily incurred in the organization and operation of the district during the creation and construction periods as follows.

(A) Such costs were incurred or projected to incur during creation, and/or construction periods which include periods during which the district is constructing its facilities or there is construction by third parties of aboveground improvements within the district.

(B) Construction periods do not need to be continuous; however, once reimbursement for a specific time period has occurred, expenses for a prior time period are no longer eligible. Payment of expenses during construction periods is limited to five years in any single bond issue.

(C) Any reimbursement to a developer with bond funds is restricted to actual expenses paid by the district during the same five-year period for which application is made in accordance with this subsection.

(D) The district may pay interest on the advances under this paragraph. Section 293.50 of this title (relating to Developer Interest Reimbursement) applies to interest payments for a developer and such payments are subject to a developer reimbursement audit.

(17) In instances where creation costs to be paid from bond proceeds are determined to be excessive, the executive director may request that the developer submit invoices and cancelled checks to determine whether such creation costs were reasonable, customary, and necessary for district creation purposes. Such creation costs shall not include planning, platting, zoning, other costs prohibited by paragraphs (10) and (14) of this subsection, and other matters not directly related to the district's water, wastewater [~~sewage~~], and drainage system, even if required for city consent.

(18) The district shall not purchase, pay for, or reimburse the cost of facilities, either completed or incomplete, from which it has not and will not receive benefit, even though such facilities may have been at one time required by a city or other entity having jurisdiction.

(19) The district shall not enter into any binding contracts with a developer that compels the district to become liable for costs above those approved by the commission.

(20) A district shall not purchase more water supply or wastewater treatment capacity than is needed to meet the foreseeable capacity demands of the district, except in circumstances where:

(A) lease payments or capital contributions are required to be made to entities owning or constructing regional water supply or wastewater treatment facilities to serve the district and others;

(B) such purchases or leases are necessary to meet minimum regulatory standards; or

(C) such purchases or leases are justified by considerations of economic or engineering feasibility.

(21) The district may finance those costs, including mitigation, associated with flood plain regulation and wetlands regulation, attributable to the development of water plants, wastewater treatment plants, pump and lift stations, detention/retention facilities, drainage channels, and levees. The district's share shall not be subject to the developer's 30% contribution as may be required by §293.47 of this title.

(22) The district may finance those costs associated with endangered species permits. Such costs shall be shared between the district and the developer with the district's share not to exceed 70% of the total costs, unless unusual circumstances are present as determined by the commission. The district's share shall not be subject to the developer's 30% contribution under §293.47 of this title. For purposes of this subsection, "endangered species permit" means a permit or other authorization issued under §7 or §10(a) of the federal Endangered Species Act of 1973, 16 United States Code, §1536 and §1539(a).

(23) The district may finance 100% of those costs associated with federal storm water permits. The district's share shall be subject to the developer's 30% contribution as may be required by §293.47 of this title. For purposes of this subsection, "federal storm water permit" means a permit for storm water discharges issued under the federal Clean Water Act, including National Pollutant Discharge Elimination System permits issued by the United States Environmental Protection Agency and Texas Pollutant Discharge Elimination System permits issued by the commission.

(24) The district may finance the portion of an amenity lake project that is considered a recreational facility.

(A) The portion considered a recreational facility must be accessible to all persons within the district and is determined as:

(i) the percentage of shoreline with at least a 30-foot wide buffer between the shoreline and private property; or

(ii) the percentage of the perimeter of a high bank of a combination detention facility and lake with at least a 30-foot wide buffer between the high bank and private property.

(B) The district's share of costs for the portion of an amenity lake project that is considered a recreational facility is not subject to the developer's 30% contribution under §293.47 of this title.

(C) The authority for districts to fund recreational amenity lake costs in accordance with this paragraph does not apply retroactively to projects included in bond issues submitted to the commission prior to the effective date of this paragraph.

(b) All projects.

(1) The purchase price for existing facilities not covered by a preconstruction agreement or otherwise not constructed by a developer in contemplation of resale to the district, or if constructed by a developer in contemplation of resale to the district and the cost of the facilities is not available after demonstrating a good faith effort to locate the cost records should be established by an independent appraisal by a registered professional engineer hired by the district. The appraised value should reflect the cost of replacement of the facility, less repairs and depreciation, taking into account the age and useful life of the facility and economic and functional obsolescence as evidenced by an on-site inspection.

(2) Contract revenue bonds proposed to be issued by districts for facilities providing water, wastewater [~~sewer~~], or drainage, under contracts authorized under Local Government Code, §402.014, or other similar statutory authorization, will be approved by the commission only when the city's pro rata share of debt service on such bonds is sufficient to pay for the cost of the water, wastewater [~~sewer~~], or drainage facilities proposed to serve areas located outside the boundaries of the service area of the issuing district.

(3) When a district proposes to obtain capacity in or acquire facilities for water, wastewater [~~sewer~~], drainage, or other service from a municipality, district, or other political subdivision, or other utility provider, and proposes to use bond proceeds to compensate the providing entity for the water, wastewater [~~sewer~~], drainage, or other services on the basis of a capitalized unit cost, e.g., per connection, per lot, or per acre, the commission will approve the use of bond proceeds for such compensation under the following conditions:

(A) the unit cost is reasonable;

(B) the unit cost approximates the cost to the entity providing the necessary facilities, or the providing entity has adopted a uniform service plan for such water, wastewater [~~sewer~~], drainage, and other services based on engineering studies of the facilities required; and

(C) the district and the providing entity have entered into a contract that will:

(i) specifically convey either an ownership interest in or a specified contractual capacity or volume of flow into or from the system of the providing entity;

(ii) provide a method to quantify the interest or contractual capacity rights;

(iii) provide that the term for such interest or contractual capacity right is not less than the duration of the maturity schedule of the bonds; and

(iv) contain no provisions that could have the effect of subordinating the conveyed interest or contractual capacity right to a preferential use or right of any other entity.

(4) A district may finance those costs associated with recreational facilities, as defined in §293.1(c) of this title (relating to Objective and Scope of Rules; Meaning of Certain Words) and as detailed in §293.41(e)(2) of this title (relating to Approval of Projects and Issuance of Bonds) for all affected districts that benefit and are available to all persons within the district. A district's financing, whether from tax-supported or revenue debt, of costs associated with recreational facilities is subject to §293.41(e)(1) - (6) of this title and is not subject to the developer's 30% contribution as may be required by §293.47 of this title. The automatic exemption from the developer's 30% requirement provided herein supersedes any conflicting provision in §293.47(d) of this title. In planning for and funding recreational facilities, consideration is to be given to existing and proposed municipal and/or county facilities as required by TWC, §49.465, and to the requirement that bonds supported by ad valorem taxes may not be used to finance recreational facilities, as provided by TWC, §49.464(a), except as allowed in TWC, §49.4645.

(5) The bidding requirements established in TWC, Chapter 49, Subchapter I are not applicable to contracts or services related to a district's use of temporary erosion-control devices or cleaning of silt and debris from streets and storm sewers.

(6) A district's contract for construction work may include economic incentives for early completion of the work or economic disincentives for late completion of the work. The incentive or disincentive must be part of the proposal prepared by each bidder before the bid opening.

(7) A district may utilize proceeds from the sale and issuance of bonds, notes, or other obligations to acquire an interest in a certificate of convenience and necessity (CCN), contractual rights to use capacity in facilities and to acquire facilities, with costs determined in accordance with applicable law such as paragraph (3) of this subsection and Chapter 291, Subchapter G of this title (relating to Certificates of Convenience and Necessity [~~Utility Regulations~~]).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100377
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 239-0177

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CHAPTER 328. WASTE MINIMIZATION AND RECYCLING

SUBCHAPTER F. MANAGEMENT OF USED OR SCRAP TIRES

30 TAC §328.66

The Texas Commission on Environmental Quality (commission or agency) proposes an amendment to §328.66.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

At the Commissioner's Agenda held on September 15, 2010, the commissioners directed the executive director to initiate a rulemaking to remove the requirement for applicants for Land Reclamation Projects Using Tires (LRPUT) to publish public notice in adjacent counties. The amended rule will require public notice to be published only in the county in which the facility is to be located.

SECTION DISCUSSION

§328.66, Land Reclamation Projects Using Tires (LRPUT)

The proposed amendment to §328.66(a)(11) would remove the requirement for applicants of a LRPUT to publish public notice in all adjacent counties of the proposed facility location. LRPUT applicants would only need to publish public notice in the county in which the proposed facility is to be located.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule is not expected to have a fiscal impact on other units of state or local government.

Currently the rule requires public notice for LRPUTs to be published not only in the county where the facility is located but also in adjacent counties. The proposed rule amends §328.66 to remove the requirement for public notice to be published in adjacent counties.

Currently, there are nine approved LRPUTs in the state. The agency averages one LRPUT application per year. Governmental entities do not typically apply for LRPUT projects, and the proposed rule is not expected to have a fiscal impact on local governments. If a local government does apply for a LRPUT, it could experience cost savings since it will not be required to publish public notice in counties adjacent to the county where a facility is located. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties. The average cost of publishing public notice in a metropolitan area for one Sunday is estimated to be $1,169.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be efficient and cost effective notice requirements for LRPUT projects.

The proposed rule will not have a fiscal impact on individuals, but businesses applying for authorization of LRPUT projects could have lower publication costs than they do under current rules. Currently, there are nine authorized LRPUT facilities in the state, and all are owned by businesses. Public notice will not be required in counties adjacent to the county in which a LRPUT is located. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties. The average cost of publishing notice in a metropolitan area for one Sunday is estimated to be $1,169.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Small businesses applying for a LRPUT project are expected to experience the same cost savings for public notice as those experienced by a large business. The amount of savings will depend on where a LRPUT is proposed to be located and what it would have cost to publish notice in adjacent counties.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rule does not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking is intended to reduce the burden on LRPUT applicants regarding public notice and to bring the notice requirements in line with other programs notice requirements. This rule reduces the cost of preparing an application for a LRPUT because notice is required in only one county as opposed to all adjoining counties.

Furthermore, the proposal does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rule does not meet any of these applicability requirements. First, there are no standards set for authorizing these types of facilities by federal law and the proposal is not required by state law. Second, the proposed amendment does not exceed an express requirement of state law. There are no specific statutory requirements for authorizing these types of facilities. Third, the rule does not exceed an express requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not propose the rule solely under the general powers of the agency, but rather under the authority of: Texas Health and Safety Code (THSC), §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, which governs the storage, transportation, and disposal of used or scrap tires. Therefore, the commission does not propose the adoption of the rule solely under the commission's general powers.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed amendment is to reduce the burden on LRPUT applicants regarding public notice and to bring the notice requirements in line with other programs notice requirements.

The amendment does not impose a burden on a recognized real property interest and therefore does not constitute a taking. The promulgation of the proposed rulemaking is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rulemaking does not affect a landowner's rights in a recognized private real property interest because this rulemaking neither: burdens (constitutionally) or restricts or limits the owner's right to the property that would otherwise exist in the absence of this rulemaking; nor would it reduce its value by 25% or more beyond that value which would exist in the absence of the proposed rule. Therefore, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 1, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-059-328-CE. The comment period closes March 11, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Brooke Jackson, Field Operations Support Division, (512) 239-0400.

STATUTORY AUTHORITY

The amendment is proposed under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits; Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The proposed amendment implements THSC, §361.061 and §361.112.

§328.66. Land Reclamation Projects Using Tires (LRPUT).

(a) Any person or entity intending to initiate a Land Reclamation Projects Using Tires (LRPUT) shall notify the executive director in writing of the intent to fill land by means of a LRPUT. The application shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director. Owners/operators of LRPUTs are required to provide information to the executive director as part of the notification document as described in this subsection. Approval in writing by the executive director (authorization to proceed) is required before the reclamation project may be initiated. The executive director may withhold authorization to proceed if the information submitted is not deemed to be complete. The executive director shall have 60 days to review the notification documents for completeness. The executive director may request additional information if the executive director determines that the notification submittal does not address all applicable requirements of this subchapter or any potential risks to public health or the environment. The following information shall be submitted in the notification document or attachments thereto.

(1) The owner/operator of the LRPUT shall disclose in the notification the location of the project on a state highway map, United States Geological Survey map or similar, and provide a legal description of the property. The general location on the site where fill activities will take place shall be shown on one or more of these maps;

(2) A property owner's affidavit shall be submitted at the time of notification of intent to initiate a LRPUT and shall include the following:

(A) legal description of the property on which the LRPUT will occur; and

(B) acknowledgment that the owner has a responsibility to file with the county deed records an affidavit to the public advising that a reclamation project utilizing tire pieces exists on the site, and providing details about the location of the filled area within the property boundaries, areal extent of the fill project, coordinates or survey data, and the approximate volume or weight of tires which were used as fill, at such time as the fill project has been completed;

(3) The approximate volume of tire pieces proposed to be placed below ground, or the equivalent number of whole tires, and the approximate size and depth of the depression or borrow area to be filled shall be disclosed in the notification document;

(4) The approximate period of time during which the project will be conducted shall be disclosed, with estimated start and finish dates;

(5) The method of placement and commingling of the tire shreds to achieve a mix of tire pieces with the inert fill material in a proportion no greater than 50% of tire material by volume.

(6) A demonstration of the seasonal high groundwater level in the area. The executive director may require that an additional demonstration be provided for the seasonal high groundwater level at the proposed site based on the demonstration provided for the area. If the executive director requires an additional demonstration of the seasonal high groundwater level at the proposed site, the applicant shall provide the requested information within the time frame specified by the executive director.

(7) A statement signed and sealed by a professional engineer licensed to practice in Texas shall be submitted in the notification to the executive director to certify that the LRPUT is designed in a manner that will comply with the following standards.

(A) The LRPUT shall not cause a discharge of solid waste or pollutants adjacent to or into the waters of the state, including ground water, that is in violation of the requirements of the Texas Water Code, §26.121;

(B) The LRPUT shall not adversely affect human health, public safety or the environment, either during fill operations or after the reclamation project is complete; and

(C) Tire or tire pieces shall not be placed below ground in a manner that constitutes disposal as defined in Texas Health and Safety Code §361.003(7);

(8) An affidavit signed by the property owner shall be submitted certifying that:

(A) the borrow area, hole or disturbed land area existed before the project; was excavated for another purpose; and was not excavated for the burial of tire pieces;

(B) the LRPUT will be completed in a manner that will comply with all regulations set forth in this subchapter and any other rules of the commission or any other local, state or federal agency which apply; and

(C) the local fire marshal has been notified of the tire placement or fill activity.

(9) An affidavit signed by the operator shall be submitted certifying that he or she is familiar with the application and all support-

ing data; is aware of all commitments represented in the notification; is familiar with all pertinent requirements in these regulations; and agrees to develop and operate the project in accordance with the application, applicable local and state regulations, and any special provisions that may be imposed by the executive director.

(10) The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate groundwater district; and to the appropriate regional council of government. Proof of mailing shall be provided in the form of return receipts for registered mail. Prior to authorizing a LRPUT, the executive director shall consider any timely written notice by a local government with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements related to managing scrap tires and protecting public health and the environment. Local governments' notice of noncompliance shall include adequate documentation of noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local government's decision determines that an application complies with local requirements. Local governments shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director.

(11) Upon the filing of the notification documents, the facility owner or operator shall provide notice to the general public by means of a notice by publication and a notice by mail. Each notice shall specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the LRPUT project. The notices shall specify that the notification documents have been provided to the county judge and that they are available for review by interested parties. The applicant shall publish notice in the county in which the facility is located[~~, and in adjacent counties~~]. The notice shall be published once a week for three weeks. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice by certified mail, return receipt requested, shall be sent to all adjacent landowners and all owners of property within 500 feet of the boundary of the project; the health authorities of the city and county in which the project will be located, if applicable; and the appropriate state senator and representative for the area encompassing the project.

(b) Undisturbed land shall not be excavated for the purpose of filling the same land with a mixture of tires and debris or soil. Any borrow area, hole or other disturbed land area to be used for a LRPUT must have existed before the project, and it must have been excavated or soil removed for a purpose other than for the burial of tire pieces.

(c) The LRPUT shall not result in a public nuisance.

(d) An applicant for a LRPUT shall notify the local fire authority serving the area of the proposed tire placement or fill activity. If an owner or operator of a LRPUT does not intend to provide its own fire fighting personnel or system, the owner or operator shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. Prior to authorizing a LRPUT, the executive director shall consider any timely written notification by a local fire authority with jurisdiction over a proposed facility that is provided to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Such notice shall include adequate documentation of the noncompliance at the proposed facility. The executive director shall determine whether any documentation of noncompliance submitted is adequate. The executive director shall disregard such notice if a court with jurisdiction over a local fire authority's decision determines that an application complies with local requirements. Local fire authority officials shall be allowed 45 days after an applicant mails notice to mail its reply to the executive director. Applicants must provide proof that the mailed notice was received by the fire authority.

(e) All tires used to fill land shall be split, quartered, or shredded. Whole tires shall not be placed below ground.

(f) The owner and operator of the LRPUT shall comply with all applicable local ordinances, including any public safety, or zoning and land use laws.

(g) Shredded, split or quartered tires placed below ground shall be mixed in a proportion no greater than approximately 50% by volume with inert material acceptable for filling land. If greater than 50% of tire pieces by volume are placed below ground, the site is considered a tire monofill and is subject to §328.65 of this title (relating to Tire Monofill Permit Required).

(h) Tire pieces shall be placed no closer than 18 inches to the final grade or ground surface. A soil cover unadulterated with tire pieces shall make up at least the upper 18 inches of the reclamation project.

(i) The owner or operator of the LRPUT shall register as a scrap tire facility if a shredding operation is conducted on site for processing tires.

(j) The owner or operator of the LRPUT shall register as a scrap tire storage site under §328.60 of this title (relating to Scrap Tire Storage Site Registration) if:

(1) operations requiring storage of more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or more than 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers would qualify the site as a registered tire storage site under §328.60 of this title; and

(2) the construction of the LRPUT extends beyond 90 days from the date of delivery of tires or tire pieces to the site.

(k) The executive director shall issue an identifying number at the time the approval letter for the LRPUT is issued. This identifying number shall be referenced in any correspondence relating to a particular LRPUT for which such a number is issued.

(l) A person may provide the commission with written comments on any notification of a LRPUT project. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for a LRPUT.

(m) Following completion of all fill activities for the LRPUT, the owner or operator shall submit to the executive director, for review and approval, a documented certification signed by a licensed professional engineer verifying that the project has been completed in accordance with this subchapter, the notification documents, and all attachments. Once approved, this certification shall be placed in the file.

(n) The term "local government" as used in this section is defined in Texas Health and Safety Code, §361.003(17).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100379
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 239-2548

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CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS SUBCHAPTER M. REIMBURSABLE COST SPECIFICATIONS FOR THE PETROLEUM STORAGE TANK REIMBURSEMENT PROGRAM

30 TAC §334.560

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 30 TAC §334.560 is not included in the print version of the Texas Register. The figure is available in the on-line version of the February 11, 2011, issue of the Texas Register.)

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §334.560.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On August 4, 2010, the Texas Commission on Environmental Quality received a petition for rulemaking from Grissom & Thompson, L.L.P., representing Talon/LPE, Grimes & Associates, and Ranger Environmental Services, Inc. (the Petitioner). At the September 29, 2010, Commissioners' Agenda, the commission directed staff to initiate rulemaking to address the concerns raised by the Petitioner. The Petitioner requested revisions to three reimbursable pay items in §334.560, Reimbursable Cost Specifications, for the Petroleum Storage Tank (PST) Reimbursement Program. The current rules set reimbursement rates for expenses associated with corrective action activities conducted at Leaking Petroleum Storage Tank (LPST) sites by eligible owners and operators. The last revision to the reimbursable rates was on November 18, 2004. The Petitioner requests that reimbursable rates be increased for off-site access fees charged by municipalities; waste disposal costs; and per diem costs. The Petitioner indicated that increased market prices for these items have occurred over the last six years resulting in undue financial hardship to eligible owners and operators or their authorized assignees. Amending the reimbursable rates for these items would allow eligible LPST owners and operators to receive reimbursement payments that are more representative of current market rates for these corrective action activities.

SECTION DISCUSSION

Throughout this rulemaking package, administrative changes are proposed in accordance with Texas Register requirements.

This rulemaking proposes to amend the municipality fee found in Activity 04: Site Assessments of the figure in §334.560. Municipality or government fees vary significantly throughout the state. The current rule caps the reimbursement of these fees at $500.00 per well or boring. Some municipalities do not charge a fee and some municipalities currently charge as much as $1,500.00. The proposed amendment would increase the reimbursable unit cost of a well or boring installation on property owned by a municipality or government agency to the actual cost of the permit, rather than being capped at $500.00. This rulemaking proposes to cap reimbursement of the initial permit costs and annual fees at the rate the municipality or government entity charges upon the effective date of this rule.

This rulemaking proposes to amend waste management costs in §334.560. The waste management items are: vacuum truck rental, liquid disposal, and soil disposal costs. The proposed rule change would increase the reimbursable unit cost for the use of a vacuum truck to dispose of LPST wastes from the existing $70.00 per hour referenced in Activities 02, 03, 04, 06, 07, 09 and 10 of the figure in §334.560 to $85.00 per hour. The increase is based on an average of quotes from major vacuum truck rental companies in various areas of the State. Current liquid disposal costs referenced in Activities 02, 03, 04, 06, 07, 09, and 10 of the figure in §334.560 are consistent with current market prices based on quotes obtained from major waste disposal companies in various areas of the state. Therefore, the existing reimbursable rate of $.40 per gallon in the figure in §334.560 is proposed to remain at the same rate.

Reimbursable soil disposal costs referenced in Activity 04 of the figure in §334.560 are currently $250.00 base + $45.00 per drum or $250.00 base + $10.50 per cubic yard. The Petitioner requests that this reimbursable cost be raised to $250.00 base + $50.00 per drum and $250.00 base + $35.00 per cubic yard. Based on reviews of quotes from major waste disposal companies throughout the State and in New Mexico, and to address the Petitioner's concerns, revisions to the soil disposal costs are proposed to reflect this increased rate.

Revisions to the per diem rates in §334.560 are also proposed. The current per diem reimbursable rate is $90.00 per day per person. Per diem rates are referenced in Activities 02, 03, 04, 06, 07, 08, 09, 10, and 11 and in Part 4 - Travel Costs of the figure in §334.560. It is proposed that the per diem rate be changed to be consistent with per diem as allowed by the Texas Comptroller of Public Accounts. This change would result in an estimated increase of $31.00 - $104.00 per day.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency. Other units of state or local government may see a benefit as a result of administration or enforcement of the proposed rule, but any benefit is not expected to have a significant fiscal impact.

The proposed rule is in response to a petition received by the agency to align PST Reimbursement Program reimbursement rates for off-site access fees charged by municipalities, waste disposal costs, and per diem costs more closely with actual prices currently experienced by owners and operators of tanks at reimbursement eligible LPST sites. The proposed rule amends Chapter 334 to allow for an increase in these rates. The last revision to reimbursable rates was in 2004. Current market rates for off-site access fees charged by municipalities,

costs for waste disposal, and costs for per diem have exceeded amounts allowed under current rule in some cases.

Agency Impact

The proposed rule is not expected to have a significant fiscal impact on the agency since currently available funds and resources will be used to implement the rule's provisions. However, the proposed rule may represent as much as a 10% increase in funds expended out of existing Account 655 - Petroleum Storage Tank Remediation (PSTR) Account appropriation authority. Reimbursement costs for any one site are capped at one million dollars. The PST Reimbursement Program is set to expire on September 1, 2012, with the last day to perform reimbursable corrective action being August 30, 2011. Staff estimates that implementation of the proposed rule would only be in effect two to three months and that the increase in reimbursement rates for this time period would not exceed one million dollars statewide.

Impact on Local Government and Other State Agencies

Agency records indicate there may be as many as 38 local governments that own or operate eligible LPST sites. These sites are located mainly at maintenance facilities or gas refueling facilities. Of these sites, eight are owned by counties, nine are owned by other state agencies, 20 are municipalities, and one is a federal facility. Most remediation work at LPST sites are done by registered contractors. If these contractors incur higher costs for off-site access, waste disposal and per diem, the proposed rule may allow a governmental entity to receive higher reimbursement payments with PSTR funds than allowed by current rule. However, the proposed increase in these reimbursement rates is not expected to be significant and will depend on the circumstances of each site.

Off-site Access Fees

The proposed rule would increase the maximum reimbursement rate allowed for off-site access fees charged by municipalities or government agencies. There is little consistency statewide in the way municipalities and government agencies determine off-site access fees. Fees vary widely, and the current rule caps the reimbursement for a monitoring well or soil boring at a maximum of $500 per well or boring. Permit costs for monitoring wells are estimated to range from $350 per well to $1,500 per site per year. The proposed rate would be the actual cost per well as specified in the permit issued by the municipality or government agency, but it will be capped at the rate existing on the effective date of the proposed rule. Some, but not all, municipalities and government agencies charge additional annual fees as part of off-site access fees. Current rule does not allow for reimbursement of this type of cost. The proposed rule allows for reimbursement of annual fees, if already in existence on the effective date of this rule. However, any reimbursement of these annual fees would be capped at the rate the municipality or government entity charges upon the effective date of this rule.

Waste Disposal Costs

These costs include expenses for vacuum truck rental, liquid disposal, and soil disposal. The proposed rule would increase the reimbursable rate for the use of a vacuum truck from $70 per hour to $85 per hour. The $15 increase is based on an average of quotes from vacuum truck rental companies in various areas of the state. The proposed rule would also increase the reimbursable rate for soil disposal costs. Currently soil disposal costs are reimbursed at a maximum $250 base rate plus a unit cost of $45 per drum or a unit cost of $10.50 per cubic yard. Under the proposed rule, base rates would remain $250 but reimbursement for a drum would increase $10 per drum to total $50 per drum, and the reimbursement for a cubic yard would increase by $24.50 to total $35 per cubic yard. Reimbursement rates for liquid disposal were found to be in line with current rates, and the proposed rule would not increase reimbursement for liquid disposal.

Per Diem Costs

Current rules allow per diem to be reimbursed at a maximum of $90 per day. The proposed rule would allow per diem to be reimbursed at the same rate paid by the Comptroller of Public Accounts. Per Diem rates vary depending on the location, but the default rate is currently $121 ($85 for lodging and $36 for meals). The highest rate is currently $194. The increase in per diem under the proposed rules is estimated to range from $31 to $104.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule would be fair reimbursement of costs which encourages continued remediation of LPST sites and movement toward site closure.

Most LPST sites are retail gasoline facilities. The proposed rule would not have a significant fiscal impact on individual consumers. However, large companies that own LPST sites may benefit by the increase in reimbursable rates for off-site access fees, waste disposal costs, and per diem costs allowed under the proposed rule. There are approximately 129 eligible sites owned by large businesses statewide. The fiscal impact of increased reimbursement is not expected to be significant for a large business. Large businesses would be allowed to apply for reimbursement of off-site access fees, waste disposal costs, and per diem costs at the same rates as allowed for a governmental entity or a small business.

Most remediation work at LPST sites is done by hiring a registered contractor. For purposes of this fiscal note, most of these contractors are assumed to be a small business. The analysis of the fiscal impact of the proposed rule on contractors can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT of this fiscal note.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. There are approximately 449 small businesses that own or operate eligible LPST sites in the state. Most of these small businesses own or operate a retail gas facility, and most remediation at these sites is done by registered contractors who, for purposes of this fiscal note, are assumed to be small businesses. The proposed rule would increase the maximum rates allowed for reimbursement of off-site access fees, waste disposal costs, and per diem costs. The proposed rate for off-site access fees would include the actual cost per well as specified in the permit issued by a municipality or government agency, but it would be capped at the rate existing on the effective date of the proposed rule. Some, but not all, municipalities and government agencies charge annual fees as part of off-site access fees. Current rule does not allow for reimbursement of this type of cost. The proposed rule allows for reimbursement of annual fees if they exist at the time of the effective date of this rule. However, any reimbursement of these additional fees would be capped at the rate existing on the

effective date of the rule. With regards to waste disposal costs, the proposed rule would increase the reimbursable rate for the use of a vacuum truck from $70 per hour to $85 per hour. For soil disposal costs, the proposed rule would increase the unit cost reimbursement for a drum by $10 per drum and for a cubic yard by $24.50 per cubic yard. The proposed rule would allow per diem to be reimbursed at the same rate paid by the Comptroller of Public Accounts instead of a maximum of $90.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Regarding the first part of this definition, the specific intent of this rulemaking is to "protect the environment" by increasing certain amounts that would be reimbursed by the PST Reimbursement Program to eligible owners and operators, or their authorized assignees, for performance of corrective action at LPST sites. However, the second part of the definition of a "major environmental rule" is not met: the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The term, "material" means "having real importance or great consequence" in contrast to incidental or insignificant impact. Because the rule proposal proposes to increase amounts being reimbursed to eligible owners or operators, and because this rule does not involve any increase in costs being imposed on the public or regulated entities, there is no adverse effect on the state so as to constitute a "major environmental rule."

Further, even if it were considered a "major environmental rule," the rule proposal does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) states: "This section applies only to a major environmental rule adopted by a state agency, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rules does not meet any of the four applicability requirements and thus, is not subject to the regulatory analysis provisions of the Texas Government Code. Specifically, the proposed rule does not exceed a standard set by federal law; does exceed an express requirement of state law; does not exceed a requirement of a federal delegation agreement or contract; and is not adopted solely under the general powers of the agency but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY sections of this rulemaking.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to increase certain amounts that would be reimbursed by the PST Reimbursement Program to eligible owners and operators, or their designated assignee contractors, for performance of corrective action at LPST sites. These increases are intended to take into account the rising market prices of performing certain corrective action activities and associated costs. The proposed rule would substantially advance this stated purpose by amending portions of §334.560 to make reasonable adjustments to reimbursable costs.

The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rule because the proposed rule in total is an action in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. By increasing reimbursable amounts to be in keeping with certain costs in the marketplace, this rulemaking helps ensure that LPST cleanups continue to occur in the PST Reimbursement Program. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rule is an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from USTs pose a threat to both soils and groundwater with which the public may come into contact. The proposed rule is "designed to significantly advance the health and safety purpose" by helping to ensure that adequate reimbursements are available for the corrective action of this contamination. The proposed rule does not "impose a greater burden than is necessary to achieve the health and safety purpose" because the proposed rule revisions do not impose a burden, since it represents an increase in reimbursement payments rather than a lessening.

Nevertheless, the commission further performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The proposed rule adjusts the Reimbursable Cost Specifications by increasing amounts eligible owners or operators may receive from the PSTR Account for performance of necessary corrective action and related allowable costs. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rule does not affect a landowner's rights in private real property because this rulemaking does not burden (constitution-

ally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rule. There are no burdens imposed on private real property from the proposed rule and the benefits to society are the proposed rule effect of increasing the likelihood that LPST sites will be cleaned up by ensuring that costs of such cleanups are being adequately addressed in the PST Reimbursement Program. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include two of the goals listed in 31 TAC §505.12: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and (2) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs. Because this rulemaking increases certain amounts that eligible owners or operator may be reimbursed for remediating LPST sites, it will therefore aid in ensuring that releases to the environment continue to be addressed. This rulemaking is consistent with the goals of protecting and preserving coastal environments.

None of the CMP policies stated in 31 TAC §501.13 are relevant to, nor are they adversely affected by, the proposed rule for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances. Additionally, none of the specific policies described in 31 TAC §§501.16 - 501.34 apply to this rulemaking.

Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies, and because the rule does not create or have a direct or significant adverse effect on any CNRAs.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 3, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-004-334-CE. The comment period closes March 13, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Jonathan Walling, Petroleum Storage Tank/Dry Cleaner Remediation Section, (512) 239-2295.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks; TWC, §26.3573, which states that the commission shall administer the petroleum storage tank remediation account and by rule adopt guidelines and procedures for the use of and eligibility for that account and which states that the commission may by rule adopt: (1) guidelines the commission considers necessary for determining the amounts that may be paid from the petroleum storage tank remediation account; and (2) guidelines concerning reimbursement for expenses incurred by an eligible owner or operator; and TWC, §26.011, which requires the commission to control the quality of water by rule.

The proposed rulemaking implements TWC, §26.3573(h), which requires the commission to administer the petroleum storage tank remediation account and by rule adopt guidelines and procedures for the use of and eligibility for that account.

§334.560. Reimbursable Cost Specifications.

The following Reimbursable Cost Specifications for the Petroleum Storage Tank Reimbursement Program are in effect as of June 30, 2011 [~~November 18, 2004~~].
Figure: 30 TAC §334.560
[~~Figure: 30 TAC §334.560~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100380

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 239-2548

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

The Texas Juvenile Probation Commission proposes amendments to §§341.1, 341.3, and 341.28, concerning Texas Juvenile Probation Commission standards. The Texas Juvenile Probation Commission proposes the repeal of §§341.20 - 341.23 and 341.30, also concerning Texas Juvenile Probation Commission standards. These amendments and repeals are being proposed in an effort to clarify certification requirements and ensure consistency with other chapters of agency standards.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five-year period the amendments and repeals are in effect, there will be no fiscal implications for state or local government. There will be no fiscal implications for small businesses or individuals as a result of enforcement or implementation.

Ms. Capers has also determined that for each year of the first five years the amendments and repeals are in effect, the public benefit expected as a result of enforcement or implementation will be consistent information and clear expectations with regard to certification of juvenile officers.

Public comments on the proposed amendments and repeals may be submitted in writing to Kristy Almager at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Kristy.Almager@tjpc.state.tx.us* or faxed to (512) 424-6718.

SUBCHAPTER A. DEFINITIONS

37 TAC §341.1

The amendment is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this proposal.

§341.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Alleged Victim--A juvenile alleged as being a victim of abuse, exploitation or neglect.

(2) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department including the juvenile probation department of a multi-county judicial district.

(3) Commission--The Texas Juvenile Probation Commission.

(4) Juvenile Justice Program--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

~~[(4) Juvenile Justice Program--A non-residential program operated for the benefit of juveniles referred to a juvenile probation department that is either directly administered by the juvenile probation department, or is operated under contract with a juvenile board. A juvenile justice program does not include any program operated in a facility that is licensed or operated by a state agency other than a facility registered with the Texas Juvenile Probation Commission.]~~

(5) Referral--A referral to the juvenile court for conduct defined in Texas Family Code §51.03 that results in a face-to-face interview between the juvenile and the authorized staff of the juvenile probation department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100351
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER B. JUVENILE BOARD RESPONSIBILITIES

37 TAC §341.3

The amendment is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this proposal.

§341.3. Policy and Procedures.

(a) Personnel Policies. The juvenile board shall adopt written personnel policies. These personnel policies shall include but not be limited to:

(1) a salary scale for all juvenile probation officers; and

(2) the provision for juvenile probation officers to receive all applicable benefits and allowances given to county employees.

(b) Department Policies. The juvenile board shall adopt written department policies and procedures. These policies shall include but not be limited to:

(1) Deferred Prosecution. The deferred prosecution policy shall at a minimum include the following policies:

(A) The maximum supervision fee for deferred prosecution cases is $15.00 per month.

(B) The monthly fee shall be determined after obtaining a financial statement from the parent or guardian.

(C) The fee schedule shall be based on total parent/guardian income.

(D) The chief administrative officer, or the chief administrative officer's designee shall approve in writing the fee assessed for each child including any waiver of deferred prosecution fees.

(E) A deferred prosecution fee shall not be imposed if the juvenile board does not adopt a fee schedule and rules for waiver of the deferred prosecution fee.

(2) Volunteers and Interns. If a juvenile probation department has or develops a volunteer or internship program, the juvenile board at a minimum shall adopt the following policies for the volunteer and internship program:

(A) a description of the authority, responsibility and accountability of volunteers and interns who work with the department;

(B) a requirement for criminal history searches in accordance with the requirements set forth in §344.300 of this title;

~~[(B) performance of a Texas criminal history background search (TCIC);]~~

~~[(C) performance of a local law enforcement sex offender registration records check in the city or county where the volunteer or intern resides;]~~

(C) [~~(D)~~] selection and termination criteria including disqualification based on criminal history;

(D) [~~(E)~~] orientation and training requirements including training on reporting abuse, exploitation and neglect;

(E) [~~(F)~~] a requirement that volunteers and interns meet minimum professional requirements; and

(F) [~~(G)~~] a provision for a volunteer and intern sign in log.

(3) Experimentation. The policy shall at a minimum prohibit a department or juvenile justice program from using juveniles for medical, pharmaceutical, or cosmetic experiments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100352
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER E. EMPLOYMENT OF CERTIFIED JUVENILE PROBATION OFFICERS

37 TAC §§341.20 - 341.23

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Juvenile Probation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this proposal.

§341.20. Qualifications for Employment.

§341.21. Exemption from Qualifications.

§341.22. Criminal Records Check.

§341.23. Disqualification from Employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100353
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER F. REQUIREMENTS FOR JUVENILE PROBATION OFFICERS

37 TAC §341.28

The amendment is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this proposal.

§341.28. Certification of Staff [~~Persons Who Must be Certified~~].

(a) Individuals required to maintain an active certification as a condition of employment are:

(1) Chief administrative officers;

(2) Facility administrators;

(3) Juvenile probation officers; and

(4) Juvenile supervision officers.

(b) Additional individuals who may maintain an active certification is limited to those whose primary responsibility and essential job function is:

(1) Supervisor of juvenile probation officers or juvenile supervision officers;

(2) Quality assurance officer; and

(3) Juvenile probation and supervision officer trainer.

[~~The chief administrative officer and any person hired as a juvenile probation officer, or as a supervisor of juvenile probation officers shall obtain and maintain an active juvenile probation officer certification from the Commission in accordance with Chapter 349 of this title.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100354
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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37 TAC §341.30

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Juvenile Probation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this proposal.

§341.30. Code of Ethics.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100367
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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CHAPTER 355. NON-SECURE JUVENILE CORRECTIONAL FACILITIES

The Texas Juvenile Probation Commission proposes new Chapter 355, §§355.100, 355.102, 355.104, 355.106, 355.108, 355.110, 355.200, 355.202, 355.204, 355.206, 355.208, 355.210, 355.212, 355.214, 355.216, 355.218, 355.220, 355.222, 355.224, 355.226, 355.228, 355.300, 355.302, 355.304, 355.306, 355.308, 355.310, 355.312, 355.314, 355.316, 355.318, 355.320, 355.322, 355.324, 355.326, 355.328, 355.330, 355.332, 355.334, 355.336, 355.338, 355.340, 355.342, 355.344, 355.346, 355.348, 355.350, 355.352, 355.354, 355.356, 355.400, 355.402, 355.404, 355.406, 355.408, 355.410, 355.412, 355.414, 355.416, 355.418, 355.500, 355.502, 355.504, 355.506, 355.508, 355.510, 355.512, 355.514, 355.516, 355.518, 355.520, 355.522, 355.524, 355.526, 355.528, 355.530, 355.532, 355.534, 355.536, 355.538, 355.540, 355.542, 355.544, 355.546, 355.548, 355.550, 355.552, 355.554, 355.556, 355.558, 355.560, 355.562, 355.564, 355.566, 355.568, 355.570, 355.572, 355.574, 355.576, 355.578, and 355.580, concerning non-secure juvenile correctional facilities. These rules are being proposed in an effort to comply with §51.126 of the Texas Family Code and House Bill 3689, adopted by the 81st Texas Legislature, authorizing the Commission to develop non-secure juvenile correctional facility standards.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five-year period the new rules are in effect, there will be a wide range of fiscal implications for state or local government as a result of enforcement and implementation depending on the existence of physical plant and staffing requirements. For the first five-year period that the new rules are in effect, there could also be significant fiscal implications as a result of enforcement or implementation for small businesses or individuals who choose to operate a non-secure correctional facility in order to comply with these new rules. Factors involve the number of staff and the certification requirements as well as various physical plant issues that may affect the fiscal implications.

Ms. Capers has also determined that for each year of the first five years the rules are in effect, the public benefit expected as a result of enforcement or implementation will be having a standardized accountability system in place for non-secure correctional facilities in order to rehabilitate a juvenile offender while maintaining safety in the community as well as within the facilities.

Public comments on the proposed rules may be submitted in writing to Kristy Almager at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Kristy.Almager@tjpc.state.tx.us* or faxed to (512) 424-6718.

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§355.100, 355.102, 355.104, 355.106, 355.108, 355.110

The new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these rules.

§355.100. Purpose.

The purpose of this chapter is to establish minimum operational and programmatic standards for non-secure correctional facilities in Texas.

§355.102. Certification and Registration of Facility.

Before admitting residents, the governing board in the county where the facility is located, shall:

(1) certify the non-secure correctional facility is in compliance with §51.126 of the Texas Family Code;

(2) indicate the number of beds in the facility certification;

(3) register the facility with the Commission in compliance with §51.126 of the Texas Family Code; and

(4) post within a public area of the facility the current facility certification and the Commission's facility registration.

§355.104. Interpretation and Applicability.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards in this chapter.

(b) Including. The word "including," when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but, rather, as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

(c) Applicability. This chapter applies to all non-secure correctional facilities in this state, except for a facility operated or certified by the Texas Youth Commission. This chapter does not apply to a facility that is licensed by a state governmental entity or that is exempt from licensure by state or federal law. Furthermore, all standards requiring written policies and procedures are expected to be implemented and practiced.

(d) Compliance Resource Manual and Implementation of Agency Policy. The Commission may establish by administrative rule or other reasonable agency policy, the required guidelines, procedures, and documentation necessary to ensure compliance and verification of the standards set forth in this chapter.

§355.106. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless otherwise expressly defined within the chapter.

(1) Chief Administrative Officer--Regardless of title, the person hired by a governing board who is responsible for oversight of the day-to-day operations of a juvenile probation department for a single county or a multi-county judicial district.

(2) Commission--The Texas Juvenile Probation Commission (TJPC).

(3) Contraband--Any item not issued to employees for the performance of their duties and which employees have not obtained supervisory approval to possess. Contraband also includes any item given to a resident by an employee or other individual, which a resident is not authorized to possess or use. Specific items of contraband include, but are not limited to:

(A) firearms;

(B) knives;

(C) ammunition;

(D) drugs;

(E) intoxicants;

(F) pornography; and

(G) any unauthorized written or verbal communication brought into or taken from an institution for a resident, former resident, associate of or family members of a resident.

(4) Date and Time of Admission--The date and time that a juvenile has been admitted into a non-secure correctional facility.

(5) Designee--The person authorized to perform a specific duty as assigned by the facility administrator.

(6) Discipline--Guidance that is constructive or educational in nature and is appropriate to the resident's age, development, situation and severity of behavior.

(7) Facility Administrator--The individual designated by the chief administrative officer or governing board of the facility who has the ultimate responsibility for managing and operating the facility. This definition includes the certified juvenile supervision officer or non-secure residential worker who is designated in writing as the acting facility administrator during the absence of the facility administrator.

(8) Governing Board--Any governmental unit as defined in §101.001 of the Texas Civil Practice and Remedies Code that operates a non-secure correctional facility, including but not limited to a juvenile board.

(9) Hazardous Material--Any substance that is explosive, flammable, combustible, poisonous, corrosive, irritating or otherwise harmful and is likely to cause injury or death.

(10) Health Care Professional--A term that includes physicians, physician assistants, nurses, nurse practitioners, dentists, medical assistants, emergency medical technicians (EMT), and others who, by virtue of their education, credentials and experience, are permitted by law to evaluate and care for patients.

(11) Health Service Authority--The agency, organization or entity primarily composed of health care professionals or an individual health care professional that consults and collaborates with the facility administrator and/or the health services coordinator to ensure a coordinated and adequate health care system is available to residents of the facility.

(12) Housing Area--An area within the non-secure correctional facility that contains resident housing units.

(13) Housing Unit--A unit within the housing area that may be designed and constructed as either a single occupancy housing unit (SOHU) or a multiple occupancy housing unit (MOHU).

(14) Intensive Physical Activity Component--Any program or component that requires participants to engage in and perform strenuous physical training and activity. This does not include recreational team activities or activities related to the educational curriculum (i.e., physical education).

(15) Intra-Jurisdictional Custodial Transfer--The transfer of a resident from a pre-adjudication or post-adjudication secure facility into a non-secure correctional facility under the same administrative authority.

(16) Isolation--The segregation of a resident from other residents and the placement of the resident alone in an area for medical or protective purposes.

(17) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program administered or operated under the authority of the juvenile board.

(18) Juvenile Supervision Officer--A person whose primary responsibility and essential function is the supervision of juveniles in a juvenile justice facility, or a juvenile justice program operated by or under contract with the governing board.

(19) Material Safety Data Sheet (MSDS)--A document prepared by the supplier or manufacturer of a product clearly stating its hazardous nature, ingredients, precautions to follow, health effects and safe handling/storage information.

(20) Medical Treatment--Medical care, other than routine examinations, including diagnostic testing (e.g., x-rays, laboratory testing, etc.), performed or ordered by a physician, physician assistant or performed by a licensed nurse practitioner, emergency medical technician (EMT), paramedic or licensed vocational nurse (LVN) according to their respective licensure.

(21) Mental Health Paraprofessional--An individual who is able to perform tasks requiring significant knowledge, but without having the license or certification to perform at a professional level, including students, interns, fellows, post-doctorates, or other approved students in an official training program in psychology or a related field under the supervision of an authorized mental health professional.

(22) Mental Health Professional--An individual who has met the educational requirements and is licensed or certified by one or more of the following governmental entities:

(A) Texas State Board of Examiners of Psychologists;

(B) Texas State Board of Examiners of Professional Counselors;

(C) Texas State Board of Examiners of Marriage and Family Therapists;

(D) Texas Department of State Health Services;

(E) Texas Medical Board;

(F) Texas State Board of Social Worker Examiners provided that the licensure is Licensed Clinical Social Work; or

(G) Texas State Board of Social Worker Examiners provided that the licensure is Licensed Master Social Work accompanied with written recognition by the board for independent practice.

(23) Mental Health Screening--A process that includes using a screening instrument approved by the Commission designed to identify a resident who is at an increased risk of having mental health issues that warrant further review.

(24) Multiple Occupancy Housing Unit (MOHU)--A housing unit designed and constructed for multiple occupancy sleeping.

(25) Non-Program Hours--Time period when scheduled resident activity on the facility's premises has ceased for the day.

(26) Non-Secure Juvenile Correctional Facility--A facility, other than a secure correctional facility, that accepts juveniles who are on probation and that is operated by or under contract with a governmental unit, as defined by §101.001 of the Texas Civil Practice and Remedies Code.

(27) Non-Secure Residential Worker--A person who is responsible for the supervision, guidance, and protection of a juvenile in a non-secure correctional setting and is certified as a youth activities supervisor by the Commission when meeting the requirements under Chapter 344 of this title. This includes persons employed on a part-time, temporary or seasonal basis.

(28) Positive Screening--A scored result of a completed mental health screening instrument (i.e., MAYSI-2) recommending services requiring a primary service by a mental health professional as described on the MAYSI-2 reference card.

(29) Probation--For the purposes of this chapter, the period of time that a juvenile is placed under the jurisdiction of the juvenile court.

(30) Program Staff--All full-time, part-time, temporary and seasonal staff, other than certified juvenile probation officers, certified juvenile supervision officers and certified youth activities supervisors, who are employed or contracted to perform program-related duties.

(31) Professionals--The following persons are considered to be professionals for the limited purposes of this chapter:

(A) teachers certified as educators by the State Board for Educator Certification, including teachers certified by the State Board for Educator Certification with provisional or emergency certifications;

(B) educational aides or paraprofessionals certified by the State Board for Educator Certification;

(C) health care professionals licensed or certified by:

(i) the Texas Board of Nursing;

(ii) the Texas Medical Board;

(iii) the Texas Physician Assistant Board;

(iv) the Texas Department of State Health Services; or

(v) the Texas State Board of Dental Examiners;

(D) mental health professionals as defined in this section;

(E) qualified mental health professional as defined in this section;

(F) mental health paraprofessional as defined in this section;

(G) social workers licensed by the Texas Board of Social Worker Examiners;

(H) juvenile personnel certified by the Texas Juvenile Probation Commission; and

(I) commissioned law enforcement personnel.

(32) Protective Isolation--The exclusion of a threatened resident from the group by placing the resident in an individual room that minimizes contact with the residents from a specific group.

(33) Program Hours--The time period when the resident population has scheduled facility activities.

(34) Qualified Mental Health Professional--An individual employed by the local mental health authority or an entity who contracts as a service provider with the local mental health authority who meets the guidelines of the Texas Department of State Health Services.

(35) Rated Capacity--The maximum number of beds available in a facility that were architecturally designed or redesigned as a housing unit.

(36) Resident--A juvenile who is placed in the non-secure correctional facility under the jurisdiction of the juvenile court.

(37) Restriction--The removal of a resident from program activities or other residents for behavior modification or minor disciplinary reasons for 90 minutes or less.

(38) Secondary Screening--A triage process that is brief and designed to clarify if a resident is in need of intervention or a more comprehensive assessment of the MAYSI-2 screening.

(39) Separation--The segregation of a resident from program activities or other residents because of major rule violations for 24 hours or less.

(40) Single Occupancy Housing Unit (SOHU)--A housing unit designed and constructed with separate and individual resident sleeping quarters.

(41) Volunteer--An individual who agrees to perform services without compensation and may have regular or periodic supervised contact with juveniles under the direction of the non-secure correctional facility.

(42) Youth-on-Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, or sexual performance as those terms are defined in subparagraphs (A) - (D) of this paragraph:

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with an object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons, including simulated or actual sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(E) A juvenile may not consent to the acts as defined in this paragraph under any circumstances. Consent may not be implied regardless of the age of the juvenile.

(43) Youth Activities Supervisor--Regardless of title, an individual whose primary responsibility and essential job function is the supervision of youth who are participating in the activities of a juvenile justice program or non-secure facility.

§355.108. Waiver or Variance to Standards.

Unless expressly prohibited by another standard, the governing board or chief administrative officer may make an application for waiver and the governing board may make an application for variance of any standard or standards adopted by the Commission in accordance with §349.200 of this title.

§355.110. Acceptance of Residents.

A non-secure correctional facility may only accept and admit a child, as that term is defined in §51.02(2) of the Texas Family Code, who is under the jurisdiction of the juvenile court and whose placement is authorized by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100346
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER B. PHYSICAL PLANT

37 TAC §§355.200, 355.202, 355.204, 355.206, 355.208, 355.210, 355.212, 355.214, 355.216, 355.218, 355.220, 355.222, 355.224, 355.226, 355.228

The new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these rules.

§355.200. Building and Operational Codes.

(a) The facility shall conform to all applicable federal, state and/or local ordinances and codes. Each facility shall have on file the most recent inspections conducted by the local governmental authority having jurisdiction.

(b) A formalized Life Safety Code/fire safety inspection shall be completed prior to the facility becoming operational.

(c) All subsequent Life Safety Code/fire safety inspections shall be conducted no later than 365 calendar days from the date of previous inspection.

(d) Each Life Safety Code/fire safety inspection shall result in a written report that minimally contains the following information:

(1) the name of the governmental entity that conducted the inspection;

(2) the identification of any applicable code violations or infractions and the corresponding corrective action requirements;

(3) the name and title of the person conducting the inspection; and

(4) the date(s) of the inspection.

(e) Any deficiencies noted in the annual inspection report shall be immediately addressed with the corrective action documented by the facility administrator or designee. If corrective action cannot be made within three working days, the facility administrator shall develop and document a corrective action plan to rectify deficiencies.

§355.202. Alternative Power Source.

(a) The facility shall have an alternate source(s) of electrical power that provides for the simultaneous operations of life safety systems including:

(1) emergency lighting;

(2) illuminated emergency exit lights and signs;

(3) emergency audible communication systems and equipment; and

(4) fire detection and alarm system.

(b) The alternate power source system shall be tested at least every 15 calendar days to ensure the system is in working condition.

(c) The alternate power source shall be inspected at least every 365 calendar days. This inspection must be completed by a person with qualifications established one of the following:

(1) work experience;

(2) relevant training;

(3) specialized licensure; or

(4) certification.

(d) All of the aforementioned tests shall be documented to minimally include test date and test results.

(e) A written corrective action plan shall be developed within 15 calendar days of any system malfunctions or maintenance needs that are identified. Any immediate corrective actions taken shall be documented.

§355.204. Heating and Ventilation.

(a) The facility shall provide fully functioning heating, cooling and ventilation systems adequate for the square footage of the facility.

(b) Alternate means of ventilation in the facility shall be maintained in case regular power is interrupted.

§355.206. Rated Capacity.

The population of the facility shall not exceed the rated capacity of the facility.

§355.208. Secure Storage of Restraint Devices.

There shall be a location for secure storage of restraint devices and related security equipment. This equipment shall be readily accessible to authorized persons.

§355.210. Single Occupancy Housing Units--SOHU.

(a) SOHUs shall be constructed to contain no more than 24 beds in each housing unit.

(b) Individual resident sleeping quarters shall be utilized as single occupancy only, and, at no time, may more than one resident be placed in an individual resident sleeping quarter.

(c) Individual resident sleeping quarters shall contain a bed above floor level.

§355.212. Spatial Requirements--SOHU.

(a) Individual resident sleeping quarters shall have a minimum ceiling height of 7.5 feet.

(b) Individual resident sleeping quarters shall have a minimum of 60 square feet of floor space.

§355.214. Multiple Occupancy Housing Units--MOHU.

(a) MOHUs shall be designed to contain no more than 24 beds in each housing unit.

(b) MOHUs shall have one bed above floor level for every resident assigned to the unit.

(c) MOHUs shall contain residents of the same sex.

§355.216. Spatial Requirements--MOHU.

(a) MOHUs shall have a minimum ceiling height of 7.5 feet.

(b) MOHUs shall have a minimum of 35 square feet of unencumbered floor space per bed in the housing unit.

§355.218. Shower Facilities.

Residents shall have access to shower facilities with hot and cold running water within the non-secure correctional facility.

(1) Non-secure correctional facilities designed, constructed and in operation on or after May 1, 2011 shall contain one operable shower for every six beds.

(2) The facility shall have policies and procedures regarding residents' access to shower facilities and their supervision during the use of shower facilities.

§355.220. Toilet Facilities.

Residents shall have access to toilet facilities within the non-secure correctional facility.

(1) Non-secure correctional facilities designed, constructed and in operation on or after May 1, 2011 shall contain at least one operable toilet above floor level for every six beds in each housing area.

(2) Urinals may be substituted for up to one-half of the toilets in housing areas permanently designed as all-male units.

(3) The facility shall have policies and procedures regarding residents' access to toilet facilities and their supervision during the use of toilet facilities.

§355.222. Washbasins.

Resident shall have access to washbasins within the non-secure correctional facility.

(1) Non-secure correctional facilities designed, constructed and in operation on or after May 1, 2011 shall contain one operable washbasin for every 12 beds.

(2) The facility shall have policies and procedures regarding residents' access to washbasins and their supervision during the use of washbasins.

§355.224. Drinking Water.

(a) Residents shall have access to clean and fresh drinking water within the non-secure facility.

(b) The facility shall have policies and procedures regarding residents' access to drinking water and their supervision while accessing drinking water.

§355.226. Lighting.

(a) The facility shall have adequate artificial lighting in all areas of the facility.

(b) All housing units shall provide natural light from a source directly within the housing area.

§355.228. Exercise and Common Activity Areas.

(a) Exercise Area. The facility shall provide space for an exercise area.

(b) Activity Space. The facility shall provide ample and appropriate space for residents to participate safely in program activities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100347
Lisa A. Capers
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Earliest possible date of adoption: March 13, 2011
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SUBCHAPTER C. POLICIES AND PROCEDURES

37 TAC §§355.300, 355.302, 355.304, 355.306, 355.308, 355.310, 355.312, 355.314, 355.316, 355.318, 355.320, 355.322, 355.324, 355.326, 355.328, 355.330, 355.332, 355.334, 355.336, 355.338, 355.340, 355.342, 355.344, 355.346, 355.348, 355.350, 355.352, 355.354, 355.356

The new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these rules.

§355.300. Policy, Procedure, and Practice.

The facility shall have written policies and procedures governing the operation of all non-secure correctional facilities in the county. The policies, procedures, and practices of the facility shall include:

(1) a policy in the following areas strictly prohibiting:

(A) physical, sexual or emotional abuse, neglect or exploitation of a resident by any individual having contact with a resident of the facility;

(B) youth-on-youth sexual conduct between residents;

(C) violations of the juvenile supervision officer code of ethics and code of conduct as outlined in Chapter 345 of this title;

(D) violations of any professional code of ethics or conduct by any individual providing services to or having contact with residents of the facility; and

(2) a zero tolerance policy and practice regarding sexual abuse in accordance with the Prison Rape Elimination Act of 2003 that provides for administrative and/or criminal disciplinary sanctions.

§355.302. Designation and Qualifications of Facility Administrator.

(a) The chief administrative officer, the governing board of the facility or a designee shall appoint a single facility administrator for each non-secure correctional facility. The chief administrative officer may be the facility administrator.

(b) The facility administrator shall:

(1) have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board;

(2) have either:

(A) one year of graduate study in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission; or

(B) one year of experience in full-time case work, counseling, or community or group work:

(i) in a social service, community corrections, or juvenile agency that deals with offenders or disadvantaged persons;

(ii) the Commission determines the kind of experience necessary to meet this requirement; and

(3) maintain an active Commission certification as a juvenile supervision officer.

§355.304. Duties of Facility Administrator.

(a) The facility administrator shall be responsible for the daily operations of the facility and shall maintain an office at the facility.

(b) The facility administrator shall designate an individual who is at least a certified youth activities supervisor to be in charge during his or her absence from the facility.

(c) The facility administrator shall develop, implement and maintain a policy and procedure manual for the facility and shall ensure the daily facility practice conforms to the policies and procedures detailed in the manual.

(d) The facility administrator shall review the facility's policy and procedure manual at least every 365 calendar days and maintain documentation of this review.

(e) The facility administrator shall make readily accessible the written policies and procedures manual to all staff.

(1) Documentation of acknowledgement of receipt of the policies and procedures by all staff shall be maintained in the staff personnel or training file.

(2) All changes or modifications to the policies and procedures manual shall be made available to all staff in a timely manner.

(f) The facility administrator shall ensure that all staff, including contract, temporary, seasonal or substitute employees, shall receive orientation training prior to performing the duties assigned to them.

(1) Documentation of staff orientation training and agendas shall be maintained in the personnel file or training file.

(2) Orientation training, at a minimum, shall be documented as required by the Commission and include the following topics:

(A) safety and security procedures, including but not limited to, fire drills and non-fire emergency preparedness plan;

(B) child abuse, neglect and exploitation identification and reporting as required by Chapter 358 of this title;

(C) incident reports;

(D) resident orientation handbook;

(E) behavior management system;

(F) transporting residents outside the facility;

(G) crisis intervention;

(H) distribution of medication;

(I) sexual harassment;

(J) restraint policy;

(K) resident grievance procedures; and

(L) job descriptions including duties and responsibilities of the assigned position.

(g) The facility administrator or designee shall ensure that current personnel records are maintained for each employee, which shall include:

(1) proof of age;

(2) criminal history searches conducted as required by Chapter 344 of this title;

(3) the completed application for employment;

(4) training records;

(5) applicable personnel actions;

(6) documentation of the employee's education transcripts; and

(7) applicable documentation verifying Commission certification.

(h) The facility administrator or designee shall ensure that current records are maintained for each contract service provider, which includes:

(1) a copy of the contract between the service provider and the facility;

(2) criminal history searches required by Chapter 344 of this title; and

(3) documentation verifying the service provider's licensure.

(i) The facility administrator or chief administrative officer shall provide the presiding officer of the juvenile board or governing board of the facility with periodic updates on the operation of the facility, including the following information to be provided at least every quarter:

(1) facility population/capacity reports;

(2) number of serious incidents by category that occurred in the facility;

(3) number of resident restraints by type (i.e., personal, mechanical and chemical);

(4) number of injuries to residents requiring medical treatment; and

(5) number of injuries to staff requiring medical treatment.

(j) The facility administrator or chief administrative officer shall ensure the accurate and timely submission of statistical data to the Commission in an electronic format or other format as requested by the Commission.

(k) The facility administrator or chief administrative officer shall ensure that all individuals employed by the facility or who provide contracted services who have contact with residents are subjected to all required criminal history background checks as required by Chapter 344 of this title.

§355.306. Criminal History Searches.

All staff, including contract staff, shall have criminal history searches in accordance with Chapter 344 of this title.

§355.308. Volunteers and Interns.

Facilities utilizing a volunteer or internship program shall have written policies and procedures that contain the following components:

(1) a description of the authority, responsibility, and accountability of volunteers and interns who work with the department;

(2) the selection and termination criteria, including disqualification based on specified criminal history;

(3) the orientation and training requirements, including training on recognizing and reporting abuse, neglect, and exploitation;

(4) a requirement that volunteers and interns meet minimum professional requirements, when applicable; and

(5) a written volunteer and intern registry, log or other documentation that details all dates and times a volunteer or intern is present on the premises of the facility as well as the purpose of their visit.

§355.310. Restraint Definitions.

The following words and terms when used in this chapter shall have the following meanings unless otherwise expressly defined:

(1) Approved Personal Restraint Technique--A professionally trained, curriculum-based and competency-based restraint technique that uses a person's physical exertion to completely or partially constrain another person's body movement without the use of mechanical restraints. The approved personal restraint technique shall be approved for use by the Commission.

(2) Approved Mechanical Restraint Devices--A professionally manufactured and commercially available mechanical device designed to aid in the restriction of a person's bodily movement. The approved mechanical restraint devices shall be approved by the Commission. The following are Commission-approved mechanical restraint devices:

(A) Ankle Cuffs--Metal, cloth or leather band designed to be fastened around the ankle to restrain free movement of the legs;

(B) Anklets--Cloth or leather band designed to be fastened around the ankle or leg;

(C) Handcuffs--Metal devices designed to be fastened around the wrist to restrain free movement of the hands and arms;

(D) Plastic Cuffs--Plastic devices designed to be fastened around the wrist or legs to restrain free movement of hands, arms or legs;

(E) Waist Band--A cloth, leather, or metal band designed to be fastened around the waist used to secure the arms to the sides or front of the body; and

(F) Wristlets--A cloth or leather band designed to be fastened around the wrist or arm which may be secured to a waist belt.

(3) Physical Escort--Touching or holding a resident with a minimum use of force for the purpose of directing the resident's movement from one place to another. A physical escort is not considered a personal restraint.

(4) Protective Devices--Professionally manufactured devices used for the protection of residents or staff that do not restrict the movement of a resident. Protective devices are not considered approved mechanical restraint devices.

(5) Mechanical Restraint--The application of an approved mechanical restraint device which restricts or aids in the restriction of the movement of the whole or a portion of an individual's body to control physical activity.

(6) Personal Restraint--The application of physical force alone, restricting the free movement of the whole or a portion of an individual's body to control physical activity.

(7) Restraint--Application of an approved personal restraint technique, an approved mechanical restraint device, or a chemical restraint to an individual to restrict the individual's freedom of movement or to modify the individual's behavior.

§355.312. Requirements.

The use of restraints shall be governed by the following criteria:

(1) Restraints shall only be used by juvenile supervision officers and non-secure residential workers certified in the use of the approved personal restraint technique and trained in the use of applicable mechanical restraint devices;

(2) Prior to participating in any restraint, juvenile supervision officers, non-secure residential workers and program staff shall be

trained in the use of the non-secure correctional facility's specific verbal de-escalation policies, procedures and practices;

(3) Restraints shall only be used in instances of threat of imminent self-injury, injury to others, or serious property damage;

(4) Restraints shall only be used as a last resort;

(5) Only the amount of force and type of restraint necessary to control the situation shall be used;

(6) Restraints shall be implemented in such a way as to protect the health and safety of the resident and others;

(7) Restraints shall be terminated as soon as the resident's behavior indicates that the threat of imminent self-injury, injury to others, or serious property damage has subsided;

(8) Restraints shall be administered in a manner specific or consistent to the approved personal restraint technique adopted by the facility; and

(9) Juvenile supervision officers and non-secure residential workers shall be re-trained in the approved personal restraint technique at least every 365 calendar days.

§355.314. Prohibitions.

Restraints that employ a technique listed in paragraphs (1) - (11) of this section are prohibited:

(1) Restraints used for punishment, discipline, retaliation, harassment, compliance, or intimidation;

(2) Restraints that deprive the resident of basic human necessities including restroom privileges, water, food and clothing;

(3) Restraints that are intended to inflict pain;

(4) Restraints that place a resident in a prone or supine position with sustained or excessive pressure on the back, chest or torso;

(5) Restraints that place a resident in a prone or supine position with pressure on the neck or head;

(6) Restraints that obstruct the airway or impair the breathing of the resident including a procedure that places anything in, on, or over the resident's mouth or nose;

(7) Restraints that interfere(s) with the resident's ability to communicate;

(8) Restraints that obstruct the view of the resident's face;

(9) Any technique that does not require the monitoring of the resident's respiration and other signs of physical distress during the restraint;

(10) Percussive or electrical shocking devices; and

(11) Non-ambulatory restraints.

§355.316. Documentation.

All restraints shall be fully documented and maintained. Written documentation regarding the use of restraints shall, at a minimum, require:

(1) the name of resident;

(2) the staff member(s) name and title(s) who administered the restraint;

(3) the date of the restraint;

(4) the duration of the each type of restraint, including notation of the time the restraint began and ended;

(5) location where the restraint occurred;

(6) the description of preceding activities;

(7) the behavior that prompted the initial and the continued restraint of the resident;

(8) the type of restraint applied;

(A) the specific type of personal restraint hold applied; and

(B) any type of mechanical restraint device(s) applied;

(9) efforts made to de-escalate the situation and alternatives to restraint that were attempted; and

(10) whether or not any injury occurred during the restraint to the resident or staff and the description of the injury.

§355.318. Mechanical Restraint.

Mechanical restraints shall only be used by a certified juvenile probation officer, juvenile supervision officer or non-secure residential worker trained in their use.

§355.320. Serious Incidents.

All non-secure correctional facilities shall adhere to the requirements set forth in Chapter 358 of this title regarding serious incidents.

§355.322. Abuse, Neglect and Exploitation.

All non-secure correctional facilities shall adhere to requirements set forth in Chapter 358 of this title regarding abuse, neglect and exploitation.

§355.324. Weapons.

(a) The facility shall have written policies and procedures that prohibits staff, other than a law enforcement officer acting in the scope of his or her official duty, from the possession of a weapon as defined by §46.01 of the Texas Penal Code on the facility premises or at a facility-sponsored event.

(b) The facility's policies and procedures required in subsection (a) of this section shall prohibit a juvenile probation officer authorized to carry a firearm under the auspices of §142.006 of the Human Resources Code from entering the secure area of the facility with a firearm.

(c) Each non-secure correctional facility shall have a secure apparatus outside of the facility's housing area and area that is frequently occupied by residents to store weapons other than those described in subsections (a) and (b) of this section.

§355.326. Safety and Security.

(a) Security Plan. The facility shall have a written plan that addresses security:

(1) within the facility; and

(2) on and off facility premises.

(b) Transportation. The security plan shall include policies that govern the use of motor vehicles to transport residents and address the following:

(1) methods of transportation authorized;

(2) safety and supervision;

(3) authorized transport personnel;

(4) emergency procedures;

(5) the requirement of auto liability insurance when transporting in personal vehicles; and

(6) circumstances under which residents will be allowed to drive a personal vehicle.

(c) Internal Security. The security plan shall address the facility's internal security with regard to the following:

(1) continued operations in the event of a work stoppage;

(2) key control;

(3) control of the use of:

(A) tools;

(B) medical equipment; and

(C) kitchen tools;

(4) provisions to prevent firearms from entering the facility; and

(5) provisions for coordination with law enforcement authorities in the case of situations requiring assistance from city, county or state law enforcement agencies.

(d) Documentation.

(1) The facility administrator or designee shall ensure the documentation of all special incidents, where the health and safety of residents and/or staff were or could have been jeopardized.

(2) A copy of the report shall be placed in the permanent file of any resident(s) involved in the incident.

§355.328. Searches.

(a) The facility shall have written policies and procedures that address the following elements regarding resident searches:

(1) when a search is appropriate and/or required;

(2) who is authorized to conduct the search;

(3) what types of searches are permissible;

(4) how the searches will be conducted;

(5) what to do when contraband is found; and

(6) searches being conducted only by staff of the same sex as the resident.

(b) Upon intake, residents shall be subjected to only the following searches:

(1) a pat down or frisk search as necessary for facility safety and security;

(2) an oral cavity search to prevent concealment of contraband and to ensure the proper administration of medication;

(3) a strip search in which the resident is required to surrender their clothing based on the reasonable belief that the resident is in possession of contraband or if there is reasonable belief that the resident presents a threat to the facility's safety and security;

(A) a strip search shall be limited to a visual observation of the resident and shall not involve the physical touching of a resident;

(B) a strip search shall be performed in an area that ensures the privacy and dignity of the resident; and

(C) a strip search shall be conducted by a staff member of the same gender as the resident being searched;

(4) an anal or genital body cavity search only if there is probable cause to believe that they are concealing contraband;

(A) an anal or genital body cavity search shall be conducted only by a physician. The physician shall be of the same gender as the resident, if available;

(B) all anal and genital body cavity searches shall be conducted in an office or room designated for medical procedures; and

(C) all anal and genital body cavity searches shall be documented with the documentation being maintained in the resident's file.

(c) During searches, the residents shall not be touched any more than necessary to conduct a comprehensive search.

(d) Every effort shall be made to prevent embarrassment or humiliation of the resident.

§355.330. Fire Safety Plan.

(a) The facility shall have in effect and available to all personnel, written copies of a fire safety plan for the protection of all persons in the event of a fire for their evacuation to areas of refuge and for their evacuation from the building, if necessary.

(b) The fire safety plan shall be coordinated with and reviewed by the fire department whose jurisdiction includes the facility. The coordination and review efforts required in this standard shall be validated by written documentation prepared or attested to by a representative of the applicable fire department.

(c) The fire safety plan shall require that all employees be instructed on the following:

(1) proper disposal of combustible refuse;

(2) prompt evacuation of the facility;

(3) procedures for the use and control of flammable, toxic, and caustic materials;

(4) emergency audible communication systems and equipment; and

(5) fire detection and alarm systems.

§355.332. Fire Drills.

(a) Required Fire Drills. Fire drills shall be conducted on all shifts at least every 90 calendar days. The facility shall maintain documentation of the date, time and participating staff of each fire drill.

(b) Participation. All staff on duty in the facility shall participate in the fire drills.

(c) Exits. Facility exits shall be clear of obstruction and properly marked for evacuation in the event of fire or emergencies.

(d) Evacuation Plans. Facility emergency evacuation plans shall be posted.

§355.334. Non-Fire Emergency Preparedness Plan.

The facility shall have an emergency preparedness plan that includes, but is not limited to severe weather, natural disasters, disturbances or riots, national security issues, and medical emergencies. The plan shall address:

(1) the identification of key personnel and their specific responsibilities during an emergency or disaster situation;

(2) agreements with other agencies or departments; and

(3) transportation to pre-determined evacuation sites.

§355.336. Hazardous Materials.

(a) The facility shall maintain an inventory and a copy of the Material Safety Data Sheet (MSDS) for all hazardous materials located in the facility.

(b) Materials manufactured for cleaning purposes or those used in the training process of a vocational training program or another program may be used by residents under the general supervision of a non-secure residential worker or a qualified program staff. The resident must be provided instruction on the use of the hazardous material and the proper equipment as prescribed by the MSDS.

(c) Any use of hazardous materials shall be used according to the manufacturer's instructions.

§355.338. Facility Maintenance, Cleanliness and Appearance.

(a) Housekeeping Plan. The facility shall have a written and implemented housekeeping plan for the maintenance of a clean and sanitary facility that promotes a safe environment for residents.

(1) The plan shall contain the following:

(A) a schedule for periodic and routine cleaning and housekeeping including:

(i) the identification of staff and resident responsibilities; and

(ii) the regular cleaning and disinfection of toilet and shower areas currently in use;

(B) a schedule for pest and vermin control; and

(C) a requirement for the weekly cleaning, safety, and maintenance inspection by facility staff of all areas of the facility that are currently in use.

(2) The housekeeping plan shall be accessible to facility staff.

(b) Maintenance. The facility administrator shall be responsible for ensuring that the interior physical plant, exterior grounds, and all equipment are in proper repair and safely functioning including, but not limited to, the following:

(1) repairs shall be made promptly to all furniture, fixtures, and equipment currently in use that are not in safe working order;

(2) all surfaces in facility areas currently being used shall be regularly maintained and repaired if damaged and reasonably free from graffiti and markings, excluding minor damage from reasonable and expected wear and tear from normal use; and

(3) all exterior grounds currently used for programmatic purposes or accessed by staff, residents or visitors are free from any health and safety hazards and are appropriately maintained to ensure the safe use by residents, staff and visitors.

(c) Cleanliness. All areas of the facility where residents reside or participate in programming or services shall be clean, sanitary and reasonably free from debris, rodents, insects and strong, offensive or foul odors.

§355.340. Experimentation and Research Studies.

(a) Experimentation. Participation by residents in medical, psychological, pharmaceutical, or cosmetic experiments is prohibited.

(b) Research Studies. Participation by residents in medical, psychological, pharmaceutical, or cosmetic research is prohibited unless the research study is approved in writing by the juvenile board subject to the following guidelines:

(1) The juvenile board shall promulgate approved policies that govern all authorized research studies. Studies that include medically invasive procedures shall be prohibited.

(2) Approved research studies shall adhere to all applicable policies of the authorizing juvenile board.

(3) Research studies approved by the juvenile board shall be reported to the Commission in a format prescribed by the Commission prior to the commencement of the study.

(4) The results of the study shall be made available to the Commission upon request from the facility administrator, chief administrative officer, or juvenile board.

(5) Policies governing research studies shall adhere to all federal requirements governing human subjects and confidentiality.

(6) Residents may voluntarily participate in approved research programs with the written consent of the resident's parent, guardian or custodian.

(7) A resident shall not be punished for not participating in any research study.

§355.342. Data Collection.

The facility administrator or chief administrative officer shall maintain and report to the Commission electronically, or in the format requested, accurate statistics in the following areas:

(1) total number of resident grievances;

(2) total number of personal restraint incidents;

(3) total number of mechanical restraint incidents;

(4) total number of chemical restraint incidents;

(5) total number of separations; and

(6) total number of injuries to facility staff resulting from interaction with residents.

§355.344. Classification Plan.

Facilities shall have a written classification plan that determines how residents are grouped in housing units. Residents shall, at a minimum, be classified for grouping by age, sex, offense, behavior, and any other considerations including a resident's potential vulnerabilities for sexual abuse that are discovered during the behavioral screening required in §355.352 of this chapter.

§355.346. Resident Records.

(a) Format and Maintenance of Records.

(1) Resident records shall be maintained in a uniform format for identifying and separating files.

(2) The facility shall have written policies and procedures to ensure the confidentiality of resident files.

(b) Content of Resident Records. Each resident's record shall include, at a minimum, the following:

(1) the court order and/or placement authorization documentation;

(2) a list of approved visitors;

(3) the name of the assigned probation officer;

(4) the behavioral record, including any special incidents, discipline, or grievances;

(5) emergency notification contacts;

(6) education records; and

(7) a physical as required by §355.570(b) of this chapter if the facility's programming includes an intensive physical activity component.

§355.348. Housing Records.

For each housing unit in the facility, the following documentation shall be maintained:

(1) a daily chronological log or electronic record documenting the resident's activity that identifies the non-secure residential worker(s) supervising the residents;

(2) a daily report of admissions and releases; and

(3) a population roster compiled as of 5:00 a.m. each day that shall include at a minimum:

(A) the date and time the roster was compiled;

(B) the name of all residents in the facility;

(C) the sex of all residents in the facility;

(D) the housing assignment location of all residents in the facility; and

(E) the numerical total of the resident population for each day.

§355.350. Disciplinary Reports.

(a) The facility shall have written policies and procedures that require juvenile supervision officers and non-secure residential workers to prepare a written disciplinary report for each incident occurring in the facility that constitutes a major rule violation. The policy shall require that the written disciplinary report include the details of the incident, the violation that occurred, action taken by the staff member(s), the date and time of the incident and the outcome.

(b) The disciplinary report shall be forwarded to the facility administrator within 24 hours or on the next working day. The date and time that the disciplinary report was forwarded shall be documented on the report.

§355.352. Behavioral Screening.

(a) Prior to admitting a juvenile into a non-secure correctional facility, the juvenile shall be screened for potential vulnerabilities or tendencies of acting out with sexually aggressive or assaultive behavior. Housing assignments shall be made accordingly.

(b) The behavioral screening shall take into consideration the following information, if readily available:

(1) age;

(2) current charge(s) and offense history;

(3) physical size/stature;

(4) current state of mind;

(5) sexual orientation;

(6) prior sexual victimization or abuse;

(7) level of emotional and cognitive development;

(8) physical disabilities;

(9) mental disabilities, including emotional, intellectual and developmental disabilities; and

(10) any other pertinent information.

§355.354. Personal Property.

If a resident's personal property is removed from the resident, the facility shall inventory and properly store the items taken. Documentation of the inventory shall be signed by the resident and the non-secure residential worker and maintained in the resident's file.

§355.356. Release Procedures.

Prior to the release of a resident from the facility, the authorized officer shall:

(1) verify the release authorization documents;

(2) verify the identity of the person receiving custody;

(3) secure a signed release by the individual receiving the resident's personal property;

(4) provide information to the person receiving custody regarding:

(A) all medication prescribed while the resident was in the facility that the resident is currently taking, and the name and contact information of the prescribing physician;

(B) any pending medical, mental health, or dental appointments;

(C) any present concerns regarding the resident; and

(5) secure a receipt signed by the person receiving custody.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100348
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER D. RESIDENT HEALTH AND SAFETY

37 TAC §§355.400, 355.402, 355.404, 355.406, 355.408, 355.410, 355.412, 355.414, 355.416, 355.418

The new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these rules.

§355.400. Mental Health Screening and Referral.

(a) Screening. A mental health screening instrument approved by the Commission shall be administered to each resident that is admitted into the non-secure correctional facility within two hours of admission.

(b) Referral. A resident who scores a positive screening on the screening instrument shall be:

(1) administered a secondary screening immediately to assist in clarifying the resident's need for mental health intervention;

(A) If the secondary screening confirms the positive screening and that mental health intervention is warranted, then a referral shall be made to a mental health professional or licensed

physician within two hours from the completion of the initial mental health screening.

(B) If the secondary screening substantiates that the initial positive screening was false, then no further mental health intervention is required; or

(2) referred to a qualified mental health professional for consultation within two hours from the completion of the initial mental health screening to determine if further mental health intervention is warranted.

(A) The facility shall maintain documentation of the consultation in the resident's file.

(B) If the qualified mental health professional recommends further mental health intervention is needed, then the resident must be referred to a mental health professional or licensed physician by the end of the program day.

(c) Documentation of recommendations or referrals specific to the juvenile's positive screening on the screening instrument shall be forwarded to the supervising juvenile probation officer.

(d) Documentation of referrals, completed assessments and evaluations, including dates and times, shall be retained in the resident's file and forwarded to the supervising juvenile probation officer.

§355.402. Suicide Prevention Plan.

(a) Plan. The facility shall have a written suicide prevention plan developed in consultation with a mental health professional that, at a minimum, addresses the following components:

(1) definitions of moderate and high risk for suicidal behavior;

(2) a screening methodology to assess and assign a resident's risk of suicide upon admission into the facility, and upon any indication a resident previously screened may now be at moderate or high risk for suicidal behavior. The screening methodology shall include specific provisions regarding the assessment of risk when a resident refuses or is unable to cooperate with the screening process;

(3) level of supervision for residents assigned to moderate or high risk for suicidal behavior;

(4) communication protocols among facility staff, mental health professionals, the resident's juvenile probation officer, the resident and the resident's parent, legal guardian, or custodian, including communication regarding observations or indications a resident previously screened may now be at moderate or high risk for suicidal behavior;

(5) policies and procedures for intervening in suicide attempts;

(6) reporting of resident suicides and attempted suicides, in accordance with any applicable state law, administrative standard, or local policy or ordinance;

(7) staff training on the contents and implementation of the suicide prevention plan;

(8) temporary housing of residents assigned to moderate or high risk for suicidal behavior, including the removal from the resident's presence any dangerous objects which may include clothing and bedding items; and

(9) mortality reviews designed to review the facility's compliance and possible needed revisions to the suicide prevention plan following a resident's suicide.

(b) Implementation. The facility shall implement the suicide prevention plan, and all residents shall be screened and assessed for suicide risk upon admission and as necessary thereafter.

§355.404. Transfer, Release and Referral of High Risk Suicidal Youth.

(a) If a resident is classified as a high risk for suicidal behavior, the facility shall immediately notify the sending agency for prompt transfer or release.

(1) Upon the recommendation of the sending agency, the facility shall transfer or release the resident as soon as possible.

(2) Documentation of this notification shall be maintained including the date, time, name and jurisdiction of the juvenile probation officer notified.

(b) If prompt transfer or release is not possible, the facility shall refer the resident classified as a high risk for suicidal behavior to a mental health professional or mental health care facility for further assessment or intervention. If this referral occurs, the facility shall maintain written documentation that includes:

(1) the name and title of the mental health professional or mental health care facility notified;

(2) the date and time of the referral;

(3) the method of referral; and

(4) a brief description of the response provided by the mental health professional or the responsive document from the mental health professional.

§355.406. Supervision of High Risk Suicidal Youth.

(a) Supervision. Residents classified as a high risk for suicidal behavior who are awaiting transfer or release by a juvenile probation officer or an assessment by a mental health professional as described in §355.404(b) of this chapter shall be:

(1) provided constant, uninterrupted supervision by a certified juvenile probation officer, certified juvenile supervision officer or certified youth activities supervisor; and

(2) the supervising officer shall document his or her personal observations of the high-risk resident at intervals not to exceed 30 minutes.

(b) Required Documentation. The following documentation shall be maintained for high-risk suicidal residents:

(1) the date and time the resident was classified as a high risk for suicidal behavior;

(2) name and title of the person who classified the resident as high risk for suicidal behavior;

(3) a description of the resident's behavior and/or factors that led up to the resident's classification as high risk for suicidal behavior;

(4) name of the non-secure residential worker providing supervision of the resident;

(5) the location of the resident's supervision;

(6) the date and time that the resident's juvenile probation officer was contacted regarding the high-risk classification for transfer or release; and

(7) name of person who contacted the resident's juvenile probation officer.

§355.408. Health Care Services.

(a) Health Service Authority. The facility shall designate a health service authority with which to consult when developing and implementing the health service plan.

(b) Health Service Plan. The facility shall have a written health service plan developed in consultation with the designated health service authority. The health service plan shall establish the facility's health care delivery system for all residents.

(c) Review of Health Service Plan. The health service plan shall be reviewed at least every 24 months in consultation with the health service authority.

§355.410. Medical.

(a) Mandatory Health Assessment. If a resident who is placed at a non-secure correctional facility as an alternative to detention and who has not had a health assessment by a health care professional within the 12 months immediately preceding admission into the facility, the resident shall be given a health assessment by a health care professional within 30 calendar days after admission into the facility.

(b) Pre-Admission Records. The facility shall have the following records prior to a resident's admission if the resident is placed at a non-secure correctional facility as a condition of probation or deferred prosecution agreement:

(1) A medical examination conducted by a health care professional within 30 calendar days prior to the resident's admission date.

(2) A psychological evaluation completed within 365 calendar days prior to the resident's admission.

(c) Consent for Medical Treatment.

(1) Consent for medical treatment shall be secured in accordance with Chapter 32 of the Texas Family Code.

(2) Documentation of consent for medical treatment shall be maintained in the applicable resident files.

(d) Health Screening.

(1) A health screening shall be conducted on each resident within two hours after admission by either a health care professional or an individual who has received specific training on administering the facility's health screening. The health screening instrument shall address:

(A) mental health problems;

(B) suicide risk assessment in accordance with the facility's suicide prevention plan;

(C) current state of health including:

(i) allergies;

(ii) tuberculosis;

(iii) other chronic conditions;

(iv) sexually transmitted diseases;

(v) history of gynecological problems or pregnancies; and

(vi) recent injuries at or near time of admission;

(D) current use of medication including type, dosage, and prescribing physician;

(E) visual observation of teeth and gums and notation of any obvious dental problems;

(F) vision problems;

(G) drug and alcohol use;

(H) physical or developmental disabilities;

(I) evidence of physical trauma; and

(J) the resident's weight.

(2) Intra-Jurisdictional Custodial Transfer. For intra-jurisdictional custodial transfer of residents, the only items required for the health screening at admission into a non-secure correctional facility are items enumerated in paragraph (1)(B) and (I) of this subsection.

(3) If the health screening indicates that a resident is in need of further medical evaluation, the resident shall be referred to a health care professional for further assessment within 24 hours, excluding weekends and holidays, from the date and time of the completed screening.

(4) In accordance with §142.005(a) of the Texas Human Resources Code, the facility shall have written policies and procedures governing the distribution of all medication to residents. The policy shall specify which personnel are authorized to dispense medication to residents.

(5) The facility shall have written policies and procedures governing the use and storage of prescription and non-prescription medications for residents.

(6) The resident's parent, guardian or custodian shall provide a written request for the administration of prescription medication that accompanies the resident upon admission. All prescription medication shall be in the original, properly labeled containers.

(7) The facility shall require in policies and practice that the distribution of all medication be documented including the date and time administered, name of person administering the medication, resident's name, type of medication and dosage.

(8) The facility's policies and practices shall require a medication log for over-the-counter medications distributed to the residents.

§355.412. Medical and Mental Health Services for Victims of Sexual Abuse.

(a) The facility shall make available medical and mental health services to juveniles who are victims of sexual abuse that occurred in the facility. These services include, but are not limited to, testing for sexually transmitted diseases, treatment for physical injuries and mental health issues that result from the sexual abuse.

(b) The cost of services or treatment identified under this standard shall not be assessed to the resident or the resident's parent, guardian or custodian.

§355.414. Medical Isolation.

Medical isolation may be authorized as a health precaution at the direction of a health care professional or the facility administrator.

(1) The reasons for the medical isolation of a resident shall be documented and a copy placed in the resident's file.

(2) A health care professional shall be consulted within 12 hours of the initial medical isolation for a resident that has been placed on medical isolation by a facility administrator.

(3) During medical isolation, non-secure residential workers shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

§355.416. First-Aid Kits.

Each facility shall have a first-aid kit available to the facility staff and shall be:

(1) clearly labeled;

(2) kept in a clean and sanitary condition;

(3) easily accessible to all staff;

(4) stored in a designated location known to all employees; and

(5) kept out of the reach of the residents.

§355.418. Supervision.

(a) Ratios. While on the facility premises, ratios for non-secure residential workers to residents shall adhere to the requirements set forth in this standard.

(1) Program Hours.

(A) Supervision Ratio. One juvenile supervision officer or non-secure residential worker to every twelve residents.

(B) Facility-Wide Ratio. One juvenile supervision officer or non-secure residential worker to every eight residents.

(2) Non-Program Hours.

(A) Supervision Ratio. One juvenile supervision officer or non-secure residential worker to every twenty-four residents.

(B) Facility-Wide Ratio. One juvenile supervision officer or non-secure residential worker to every twenty residents.

(b) Same-Sex Supervision Requirement.

(1) If both male and female residents are housed in the facility, at least one juvenile supervision officer or non-secure residential worker of each sex shall be on duty and available to the residents for every shift.

(2) Non-secure residential workers of one sex shall be the sole supervisors of residents of the same sex during showers, physical searches, pat downs, disrobing of suicidal youth, or during other times in which personal hygiene practices or needs would require the presence of a non-secure residential workers of the same sex.

(c) Level of Supervision.

(1) Program hours. The facility shall have written policies and procedures detailing the supervision requirements while residents are away from the facility premises.

(2) Small Groups. No more than six residents shall be supervised by a qualified individual when the individual is working with the residents in a capacity that relates to the individual's:

(A) work experience;

(B) relevant training;

(C) specialized licensure; or

(D) certification.

(3) Non-Program Hours.

(A) The facility shall have at least two juvenile supervision officers and/or non-secure residential worker on duty during non-program hours when there is at least one resident in the facility.

(B) A juvenile supervision officer and/or non-secure residential worker shall visually observe each resident at random intervals not to exceed 15 minutes in a SOHU.

(C) A juvenile supervision officer and/or non-secure residential worker shall have constant visual observation of residents in a MOHU and shall document general observations of dorm activity at intervals not to exceed 30 minutes.

(4) Non-secure residential workers shall document each visual observation made. The documentation shall include the time of the observation and generally describe the residents' behavior.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100349
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER E. RESIDENT RIGHTS AND PROGRAMMING

37 TAC §§355.500, 355.502, 355.504, 355.506, 355.508, 355.510, 355.512, 355.514, 355.516, 355.518, 355.520, 355.522, 355.524, 355.526, 355.528, 355.530, 355.532, 355.534, 355.536, 355.538, 355.540, 355.542, 355.544, 355.546, 355.548, 355.550, 355.552, 355.554, 355.556, 355.558, 355.560, 355.562, 355.564, 355.566, 355.568, 355.570, 355.572, 355.574, 355.576, 355.578, 355.580

The new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these rules.

§355.500. Resident Handbook.

(a) The written resident handbook shall be adopted by the governing board and shall include a clear explanation for the following topics:

(1) the facility's behavior management system;

(2) accessing available health care and services;

(3) accessing available mental health care and services;

(4) program rules with corresponding and maximum disciplinary sanctions;

(5) the due process protections including the formal appeal process as required by §355.512 of this chapter;

(6) grievance policies and procedures;

(7) the process for visitation and telephone use;

(8) the process for sending and receiving mail;

(9) the right to access an attorney, including legal correspondence;

(10) facility expectations regarding experimentation and research programs;

(11) the right against:

(A) illegal discrimination;

(B) residents supervising other residents;

(C) degrading and purposeless work;

(12) the right to attend or refuse religious services;

(13) information required by the Prison Rape Elimination Act of 2003 including:

(A) prevention and intervention;

(B) methods of minimizing risk of sexual abuse;

(C) reporting sexual abuse and assault; and

(D) treatment and counseling;

(14) information regarding the reporting of suspected abuse, neglect, or exploitation of a child in a juvenile justice facility program;

(15) the right of confidentiality with regard to the items included in paragraphs (6), (13) and (14) of this subsection and the assurance that the resident will not face reprisal for participating in the procedures described in these items; and

(16) the facility's zero-tolerance policy regarding sexual abuse in accordance with the Prison Rape Elimination Act of 2003.

(b) The facility shall review the content of the resident handbook with each resident within four hours of admission into the facility and provide a copy of the resident handbook to the resident.

(1) The facility shall maintain a signed acknowledgment verifying that the resident understood the content of the resident handbook in the resident's file.

(2) If the resident is not sufficiently fluent in English, a verbal and written translation shall be provided to the resident in the resident's primary language within 48 hours of admission.

(c) The facility administrator shall conduct an annual review of the resident handbook every 365 calendar days.

§355.502. Behavior Management System.

The facility shall have written policies and procedures detailing the facility's behavior management system, which shall include but not be limited to the following:

(1) Disciplinary Sanctions. The facility's policies and procedures shall include the maximum sanctions that may be applied to residents for particular behaviors that violate the facility's program rules. The policies and procedures shall, at a minimum, include the following:

(A) a requirement that disciplinary procedures be carried out promptly and that all residents are afforded due process protections;

(B) a requirement that residents are at least one level of appeal on all discipline sanctions as required by §355.512 of this chapter;

(C) prohibited behaviors and conduct, including an indication of which are major rule violations;

(D) disciplinary consequences for prohibited behaviors and conduct;

(E) description of circumstances that will allow removal from program activities; and

(F) circumstances under which a resident may be placed into another setting.

(2) Prohibited Sanctions. The facility's policies and procedures shall contain the following prohibited sanctions:

(A) corporal punishment;

(B) humiliating punishment including verbal harassment of a sexual nature or that relates to a resident's sexual orientation or gender identity;

(C) allowing or directing one resident to sanction another;

(D) deprivation or modification of required meals and snacks;

(E) deprivation of clean and appropriate clothing;

(F) deprivation or intentional disruption of scheduled sleeping opportunities;

(G) deprivation or intentional delay of medical and mental health services; and

(H) physical exercises imposed for the purposes of compliance, intimidation, or discipline with the exception of practices allowed in §355.570 of this chapter.

(3) Notice.

(A) The facility's policies, procedures, and practices shall require that a resident be provided written notice of an alleged major rule violation against him or her no more than 24 hours after the knowledge of the violation.

(B) Documentation that the resident received the notice of an alleged major rule violation shall be maintained in the resident's file.

§355.504. Protective Isolation.

(a) Protective isolation may be ordered when a resident is physically threatened by a resident or a group of residents and approved in writing by the facility administrator or designee.

(b) A resident in protective isolation shall be in the least restrictive setting possible, allowing as much program time as possible while maintaining order and safety.

(c) While in protective isolation, non-secure residential workers shall observe and record the resident's behavior at random intervals not to exceed 15 minutes.

(d) If the protective isolation of a resident exceeds 24 hours, the facility administrator or designee shall immediately conduct a documented review of the circumstances surrounding the level of threat faced by the resident and make a determination as to whether other less restrictive protective measures are appropriate and available. If continued protective isolation is approved, the facility administrator or designee shall ensure that the formalized written review document includes an alternative service delivery plan to ensure the isolated resident is afforded all required program services during their period of protective isolation.

§355.506. Restriction.

(a) Restriction may be used in increments of up to 60 minutes for behavior modification or minor disciplinary reasons.

(b) When restriction is used, non-secure residential workers shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

§355.508. Separation.

(a) Separation may be used when a resident commits a major rule violation.

(b) When separation is used, a written disciplinary report that describes the resident's precipitating behavior and identifies the staff's response shall be completed promptly, but no later than the end of the shift on which the separation occurs.

(c) Separation shall be approved in writing by the facility administrator and shall not be in excess of 24 hours.

(d) During separation, non-secure residential workers shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

(e) In addition to the requirements enumerated in subsections (b) - (d) of this section, the facility shall provide the secluded resident with an explanation of the disciplinary review process.

(f) Documentation required in this standard shall be maintained in the resident's file.

§355.510. Separation Prohibition.

Residents removed from facility programming or activities for disciplinary reasons shall not be placed in a locked area or room.

§355.512. Formal Appeals.

A resident may appeal a restriction or separation. The facility shall have written policies and procedures manual that include the provisions of a formal appeal. The provisions shall minimally include the following:

(1) provisions for a documented appeals process before a neutral and impartial person or persons not involved in administering the sanction. The appeals process shall afford each of the following due process provisions:

(A) provisions that require the resident to submit the request for an appeal no later than seven calendar days after a sanction; and

(B) provisions that require the resident's appeal to be heard within ten calendar days of resident's request; and

(2) provisions for a final disposition. A copy of the final disposition shall be retained in the resident's file.

§355.514. Discrimination.

Residents shall not be subjected to discrimination based on race, national origin, sex, sexual orientation, gender identity, or disability.

§355.516. Resident Grievance Process.

Written policies and procedures, as well as actual practices, shall demonstrate that there is a formalized grievance process to address residents' complaints about their treatment and facility services. At a minimum, the formalized grievance process shall include the following policy, procedural, and practice elements:

(1) The residents' ability to submit a grievance with full access to the process;

(2) A response and resolution to all grievances no later than five calendar days from the date the grievance is received by staff;

(3) Confidentiality of grievance without fear of reprisal;

(4) At least one level of appeal on all grievance complaints;

(A) The appeal shall be decided in a timely manner after receipt.

(B) The resident shall promptly be notified of the resolution of the appeal.

(5) The resident's ability to participate in the resolution of a grievance, including the use of an intermediary and the ability to request witnesses;

(6) Periodic formal reviews of the grievance process and dispositions by administrative-level staff;

(7) A tracking system and grievance log that accounts for all grievances submitted; and

(8) Unresolved grievances submitted by any resident who is released shall be forwarded to the facility administrator or designee to determine if any action is needed.

§355.518. Grievance Form.

The formal grievance form shall contain the following elements:

(1) the name of the resident;

(2) the resident's room;

(3) the date of the grievance;

(4) the nature or description of the grievance;

(5) the date and time of receipt;

(6) the name and title of the person receiving the grievance;

(7) the response or resolution to the grievance;

(8) the date and time of the response;

(9) the name and title of the person responding to the grievance; and

(10) a space for a written request to appeal the grievance response.

§355.520. Telephone.

(a) A resident shall be provided the opportunity for at least one five-minute phone call every seven calendar days.

(b) The parent, legal guardian, or custodian of the resident shall be provided a copy of the facility's policy regarding telephone usage.

(c) Restrictions on the minimum requirement of a resident's telephone usage shall not be imposed as a disciplinary sanction.

§355.522. Visitation.

(a) Residents have the right to receive visitors and the facility may limit a resident's rights only to the extent required to maintain safety within the facility.

(b) In accordance with §61.103 of the Texas Family Code, residents shall be allowed visitation by a parent, guardian or custodian and biological children, if applicable, at least once every seven calendar days for at least thirty minutes or the equivalent over multiple visits.

(c) The parent, guardian or custodian of the resident shall be provided a copy of the visitation schedule and with proper documentation an alternative visitation schedule allowing for employment and travel issues.

(d) A registry of all visitors shall be maintained to document the name and relationship to the resident.

§355.524. Limitations on Visitation.

(a) The policies, procedures, and practices of the facility may limit a resident's visitation rights only to the extent required to maintain safety within the facility. These policies and procedures shall be in accordance with §61.103 of the Texas Family Code.

(b) The facility administrator or designee shall provide written documentation justifying any restriction placed on a resident's visitation rights.

(c) A resident shall not be denied communication or visitation with a parent, guardian, or custodian for a prescribed period of time after admission into the facility.

(d) Restrictions on a resident's visitation rights shall not be imposed as a disciplinary sanction.

§355.526. Mail.

(a) Residents shall be provided access to writing materials and postage for no fewer than two letters every seven calendar days.

(b) When a resident is released or transferred from the facility, his or her mail shall be forwarded to the resident's new address or returned to the sender.

(c) Money received in the mail shall be held for the resident in their personal property inventory, with receipt provided to the resident, or returned to the sender.

§355.528. Inspection of Mail.

Mail may be opened by staff only in the presence of the resident with inspection limited to searching for contraband.

§355.530. Limitations on Mail.

(a) Authorized Limitations. A resident's rights to privacy and correspondence shall not be limited except when:

(1) a reasonable belief exists to suspect that the correspondence is a part of an attempt to formulate, devise, or otherwise effectuate a plan to violate state or federal laws. If such cause exists, then non-secure residential workers shall:

(A) ask the resident's permission to read the letter;

(B) if permission is denied, request a search warrant prior to opening and reading the letter;

(C) if a search warrant request is denied, the correspondence shall be provided to the resident;

(2) correspondence with certain individuals is specifically prohibited by:

(A) the resident's juvenile court-ordered rules of probation or parole;

(B) the facility's rules of separation; or

(C) a specific list of individuals furnished by a resident's parent, guardian or custodian indicating whom they feel should not communicate with the resident.

(b) Returning Mail. Such incoming correspondence as identified in subsection (a)(2) of this section shall be returned unopened to the sender.

(c) Withholding Mail. When mail is withheld from the resident, the reasons shall be documented and a copy placed in the resident's file.

§355.532. Legal Correspondence.

Residents shall be furnished adequate postage for legal correspondence during their stay in the facility.

§355.534. Personal Property.

The facility administrator shall ensure that there is adequate storage space for each resident's personal property.

§355.536. Personal Hygiene.

(a) Residents shall be given appropriate instruction on personal and oral hygiene and shall be provided necessary articles to maintain proper personal cleanliness.

(b) Residents shall be provided the opportunity to shower daily and after participating in strenuous exercise.

§355.538. Bedding.

(a) Each resident shall be provided clean and suitable bedding, including two sheets, a pillow and pillowcase, a mattress and a blanket. Mattresses with an integrated pillow may be substituted for a separate pillow and a pillowcase.

(b) Clean bed linens shall be issued at least every seven calendar days.

§355.540. Clothing.

(a) Residents shall have access to clean and appropriate clothing upon admission into the facility.

(b) Residents shall have clean and disinfected undergarments and socks daily and other clean clothing at least twice per week.

(c) Climate appropriate clothing shall be provided to all residents in the facility for any outdoor programming or activities.

§355.542. Towels.

A clean towel shall be issued to each resident daily.

§355.544. Meals.

(a) The facility shall have written policies and procedures ensuring the provision of meals for each resident in the facility.

(b) Residents shall not eat meals in their rooms unless it is necessary for facility safety.

(c) A resident shall not be denied a meal as a sanction or disciplinary measure.

§355.546. Daily Meal Schedule.

(a) Three meals shall be provided daily to each resident in the facility.

(b) At least two of the meals shall be hot.

(c) No more than 14 hours may elapse between the evening meal and breakfast unless a snack is provided.

(d) Residents shall be allowed no less than ten minutes to eat once they have received their food.

§355.548. Menu Plans.

(a) The facility shall develop and follow daily written menu plans. Menu plans shall be reviewed and approved at least every 365 calendar days by a licensed or provisionally licensed dietician to ensure that the menu plans meet or exceed the requirements of the United States Department of Agriculture (USDA).

(b) If a program staff determines that there is a legitimate need to deviate from an already approved written menu plan, such as food delivery problems, spoiled/expired food, etc., the reason for the deviation and menu substitution shall be fully documented. When menu substitutions are made, the substitution shall be of equal portions and nutritional value.

§355.550. Nutritional Requirements.

Menus shall contain a variety of foods that meet the dietary requirements of the United States Department of Agriculture (USDA).

§355.552. Modified Diets.

Modified diets shall be provided upon the recommendation of a health care professional or when a resident's religious beliefs require it.

§355.554. Staff Meals.

Staff members on duty where residents are eating are not required to eat, but if they do, they shall eat the same food served to the residents unless a special diet has been ordered by a health care professional or a staff's religious beliefs require it.

§355.556. On-site Food Preparation.

A facility that prepares food on-site shall maintain a valid permit and any required licenses issued by the local health department or the Texas Department of State Health Services.

§355.558. Off-site Food Preparation.

A facility that receives food from an off-site source shall maintain a copy of the source's valid permit and any required licenses issued by the local health department or the Texas Department of State Health Services. The transfer of such food to the facility shall be conducted in a manner to prevent contamination or adulteration.

§355.560. Educational Program.

If the educational program is on the facility premises, the facility administrator shall ensure the following:

(1) that all residents are required to participate. The educational program provided shall be administered in accordance with the Texas Education Code (TEC);

(2) that the education provider has access to residents so that the educational program is afforded to all residents, in accordance with the TEC;

(3) that residents shall be provided coursework that is aligned the Texas Essential Knowledge and Skills (TEKS), in accordance with the TEC;

(4) that the educational program provides for at least 180 days of instruction unless a waiver has been granted by the Texas Education Agency (TEA) for fewer days or the number of educational days coincides with the local school district calendar;

(5) that educational space is adequate to meet the instructional requirements for each resident for educational services provided on-site; and

(6) all educational staff shall receive a facility orientation prior to performing instructional duties at the facility. Orientation shall include:

(A) security and safety procedures;

(B) emergency procedures;

(C) behavior management system and prohibited sanctions; and

(D) reporting abuse, neglect and exploitation.

§355.562. Special Education.

(a) The facility administrator, through a cooperative effort with the Local Education Agency (LEA), shall ensure that residents with disabilities are provided a free and appropriate public education as determined by the Admission, Review and Dismissal (ARD) Committee in order to meet the individual educational needs of the resident as defined by federal and state laws.

(b) The facility administrator, through a cooperative effort with the LEA, shall ensure that residents with disabilities have available an instructional day commensurate with that of residents without disabilities, in accordance with requirements contained in 19 Texas Administrative Code §89.1075(d).

(c) The facility administrator or designee shall send notification of a resident placement in a non-secure correctional facility to the LEA as required by §29.012 of the Texas Education Code and shall retain documentation of this notice.

§355.564. Supervision During Educational Program.

If the facility offers educational services on the premises, there shall be at least one non-secure residential worker to every 12 residents. Educational staff shall not be counted in staff-to-resident ratios.

§355.566. Reading Materials.

Age-appropriate reading materials shall be available to all residents.

§355.568. Recreation and Exercise.

(a) The recreational schedule for residents who are at the facility during program hours shall offer at least one hour of the following each day:

(1) large muscle exercise; and

(2) open recreational activity.

(b) Exceptions. A resident's recreational schedule may be altered under the following conditions:

(1) participation by the resident is contra-indicated for medical reasons;

(2) the resident is in separation, restriction, protective isolation, or medical isolation; or

(3) extenuating circumstances exist that impede the recreational schedule.

(c) Recreational equipment and supplies shall be provided to the residents.

§355.570. Intensive Physical Activity Component.

(a) Governing Board Approval. Facilities shall have written authorization from the governing board prior to utilizing an intensive physical activity component.

(b) A resident shall not be permitted to participate in intensive physical activity without a copy of a physical performed by a licensed physician, licensed physician assistant, a registered nurse or doctor of chiropractic, which states that the resident has no physical limitations or conditions that would prohibit participation.

(c) A facility that has an intensive physical activity component shall develop written policies and procedures regarding extreme weather conditions that shall address the following:

(1) gradual acclimatization to hot weather;

(2) resident clothing for the various weather conditions; and

(3) temperatures and weather conditions in which activity outside is not allowed.

(d) During the intensive physical activity period, the facility shall provide residents with a water break every 30 minutes.

(e) With the exception of certified physical education teachers, staff that participate in the administration of intensive physical activity shall be certified as a juvenile supervision officer.

(f) The facility shall have written policies and procedures, including guidelines, parameters, and limitations, on the types of physical activity that may be utilized for discipline or refocusing purposes (e.g., physical activities used to discipline for non-compliant behavior or as a substitute for write-ups or separations).

§355.572. Program Hours.

Each facility shall have a daily written program schedule outlining the planned activities during program hours for residents who are on the facility premises.

§355.574. Work by Residents.

(a) Residents may be required to perform the following types of work responsibilities without monetary compensation:

(1) assignments that are part of a formalized vocational training program;

(2) tasks performed as a community service; and

(3) routine housekeeping chores that are shared by all residents in the facility, including general facility maintenance.

(b) Residents shall not be permitted to perform any work prohibited by state or federal regulations pertaining to child labor.

(c) Repetitive, purposeless, or degrading make-work is prohibited.

(d) A resident's work assignments shall be excused or temporarily suspended if medically contra-indicated.

(e) Residents shall be provided with the necessary supervision, appropriate tools, cleaning implements, and clothing to safely and effectively complete their assignments.

(f) Residents shall not perform personal services for staff.

(g) Residents shall not perform any work that is unsafe or poses a known risk to the health and safety of the residents.

(h) Credit toward the completion of community service restitution shall be given according to the juvenile court's approval.

§355.576. Vocational Training Programs.

The facility administrator shall ensure that a vocational training program offered to residents, that is not administered by the local education provider and through which no academic credit is gained, is administered by appropriately qualified persons to provide instruction or mentoring in the vocational skills.

§355.578. Religious Services.

Residents shall not be required to participate in religious services or religious counseling.

§355.580. Case Plans.

The facility shall participate with the sending juvenile probation department, the child and the child's parent, guardian or custodian in the development of the resident's case plan.

(1) The case plan shall be signed and dated by the participating facility representative, juvenile probation officer, child and child's parent, guardian or custodian.

(2) The facility shall maintain a copy of the signed and dated case plan in the resident's file.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100350

Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 424-6710

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PART 14. OFFICE OF THE INDEPENDENT OMBUDSMAN OF THE TEXAS YOUTH COMMISSION

CHAPTER 601. OFFICE OF THE INDEPENDENT OMBUDSMAN OF THE TEXAS YOUTH COMMISSION

37 TAC §§601.1, 601.4, 601.8, 601.12, 601.15, 601.19

The Office of the Independent Ombudsman (OIO) proposes new §§601.1, 601.4, 601.8, 601.12, 601.15, and 601.19 to implement the statutory requirements of Human Resources Code Chapter 64, relating to the Office of the Independent Ombudsman of the Texas Youth Commission.

Section 601.1 defines terms related to the OIO program.

Section 601.4 provides general information about the policies and procedures of the agency. The policies and procedures promote awareness of OIO information among the public and among the youth who are committed to Texas Youth Commission (TYC) facilities. The policies and procedures shall be followed by staff of the OIO.

Section 601.8 addresses the handling of complaints and inquiries. The rule provides a framework for the OIO staff to receive and handle complaints in a timely and thorough manner. The rule also provides a process for the investigation and resolution of complaints and inquiries, and includes timeframes and requires maintaining of documentation.

Section 601.12 establishes a process of review and inspection of TYC facilities. The rule requires periodic inspection of TYC facilities, provides areas of review to include review of education services, facility security, TYC's general treatment program, and review of facility safety. The rule requires that the OIO staff make findings and provide those findings to appropriate TYC leadership and provide findings to the Ombudsman.

Section 601.15 sets forth the reporting requirements the OIO will follow, including quarterly reports to the governor, the auditor, and other state leadership. These reports will cover the work of the ombudsman and the results of any review or investigation conducted by the OIO. The rule also requires the OIO to immediately report to the same state leadership any particularly serious or flagrant inappropriate activities concerning TYC. The adoption of this rule is required by Human Resources Code §64.055.

Section 601.19 establishes procedures for providing TYC the opportunity to respond to OIO reports. It also provides a deadline for TYC to submit responses to OIO reports, as required by Human Resource Code §64.060(b).

Debbie Unruh, Certifying Officer for the OIO, has determined that, for the first five-year period the proposed new sections are in effect, there are no foreseeable fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Ms. Unruh also has determined that, for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of enforcing the new sections will be consistency and accountability in the handling of all matters within the jurisdiction of the OIO. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Emily Childs, Administrative Assistant, Office of Independent Ombudsman of the Texas Youth Commission, 6400 FM 969, Austin, Texas 78724.

The new sections are authorized under the authority of Human Resources Code, §64.058, which directs the OIO to adopt rules to establish policies and procedures for the operation of the OIO. The office is further authorized to adopt rules that establish procedures for the OIO to issue reports and for the TYC to review and comment on certain OIO reports, which are prepared pursuant to Human Resources Code §64.060.

No other statutes, articles, or code are affected by this proposal.

§601.1. Definitions.

The following words and terms, as used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Complaint--any grievance or expression of dissatisfaction or concern regarding a matter within the jurisdiction of the Texas Youth Commission (TYC).

(2) Inquiry--a written or verbal request for information regarding a matter within the jurisdiction of TYC.

(3) Life Threatening Situation--an allegation that contains specific information indicating a youth may be at substantial risk of personal injury, serious or irreparable harm, or death.

(4) Ombudsman--the Governor's official appointed to respond to complaints and inquiries from the public regarding the operations of the TYC.

(5) Proponent--the TYC staff responsible for a particular operational function.

(6) Public--any person other than a TYC employee or a youth under TYC jurisdiction.

(7) Response--a letter, facsimile, e-mail, or telephone call that:

(A) acknowledges receipt of an inquiry or complaint;

(B) provides preliminary information, if any is available;

(C) indicates actions are being taken; or

(D) provides information about the outcome of actions taken by TYC.

(8) Workday--Monday through Friday, excluding state and national holidays and days when offices are closed at the direction of the ombudsman.

§601.4. General Information.

(a) The ombudsman shall create and maintain uniform policies and procedures for the Office of the Independent Ombudsman (OIO).

(b) The ombudsman shall ensure compliance with OIO policies and procedures by all OIO staff.

(c) The ombudsman shall promote awareness of the following information among the public and youth committed to the Texas Youth Commission (TYC):

(1) how the OIO may be contacted;

(2) the purpose of the OIO; and

(3) the services that the OIO provides.

(d) The ombudsman shall ensure that the TYC executive director, the Office of the Governor, and members of the Texas Legislature are apprised of any problematic, systemic trends.

§601.8. Complaints and Inquiries.

(a) Purpose. The purpose of this rule is to establish the process by which complaints may be filed with and handled by the Office of the Independent Ombudsman (OIO).

(b) General Information.

(1) The name, mailing address, and phone number used for the purpose of directing inquiries and complaints to the OIO, and a link to the OIO website shall be available on the Texas Youth Commission (TYC) website, as well as on informational material distributed by the OIO.

(A) OIO staff shall process complaints and inquiries from the public.

(B) OIO staff shall conduct investigations of complaints if the OIO determines that the complaint is not alleging criminal behavior and:

(i) a youth committed to TYC or the youth's family may be in need of assistance; or

(ii) a systemic issue in the TYC provision of services is raised by the complaint.

(2) Any OIO employee or agent may receive an inquiry or complaint and is required to ensure it is given to the correct person for resolution.

(3) The OIO shall request that complaints and inquiries be provided in writing, although verbal complaints and inquiries shall be accepted.

(4) The OIO shall request that complaints and inquiries contain specific relevant details, including:

(A) the name of any involved party(ies);

(B) the TYC number of any youth involved in the complaint or inquiry; and

(C) any locations, dates, and times.

(5) All OIO staff responding to a complaint or inquiry from the public shall act in a courteous manner and in accordance with established OIO policies.

(c) Investigation and Resolution of Complaints and Inquiries.

(1) OIO staff shall use every means appropriate to obtain as much information as possible regarding an inquiry or complaint in order to provide a complete and thorough response. Investigative paths may include, but are not limited to:

(A) research of policies and procedures for general operations questions;

(B) research of available records regarding a youth on TYC database systems;

(C) requesting information/investigation from the appropriate proponent. All investigations are evaluated to ensure they are complete and thorough;

(D) consulting with other individuals or entities, outside of TYC, who are knowledgeable of an issue addressed in the complaint or inquiry; or

(E) referring inquiries or complaints regarding youth protection issues or alleged criminal conduct to the TYC Office of Inspector General (OIG).

(2) Following an OIO investigation or a referral to the OIG or other entity, the assistant ombudsman will draft a response and provide a copy to the ombudsman.

(3) The ombudsman or the ombudsman's designee shall periodically review all closed complaints and inquiries to ensure that the inquiry or complaint has been addressed.

(d) Response Timeframes.

(1) Complaints and inquiries from the public shall generally be responded to within ten workdays. If OIO staff is unable to respond within ten workdays, an extension must be requested from the ombudsman.

(2) Complaints and inquiries from federal and state officials or their staff members shall generally be responded to within five workdays. If OIO staff is unable to respond within five workdays, an extension must be requested from the ombudsman.

(3) Allegations of life threatening situations involving youth-on-youth or staff-on-youth behavior and allegations of sexual assault shall be reported immediately (same day received) to the OIG and the ombudsman by the appropriate assistant ombudsman. The initial response shall be an acknowledgement of receipt of the allegation and assurance that action is being taken or notification that the issue has been referred to the OIG for investigation.

(4) At least every 30 days until the final disposition of the complaint, OIO staff shall notify the complainant of the status of the complaint unless notice would jeopardize an on-going criminal investigation.

(e) Documentation of Complaints and Inquiries.

(1) An information file shall be maintained for each complaint or inquiry filed. At a minimum, the following information shall be included in the file:

(A) the name of the person who filed the complaint or inquiry;

(B) the date the complaint or inquiry was received;

(C) the subject matter of the complaint or inquiry;

(D) the name of each person contacted in relation to the complaint or inquiry;

(E) a summary of the results of the review or investigation of the complaint or inquiry; and

(F) an explanation of the reason the file was closed, if the file was closed without taking action.

(2) Files shall be retained in accordance with the OIO records retention schedule.

§601.12. Review and Inspection of Facilities.

(a) The purpose of this section is to establish the process by which staff of the Office of the Independent Ombudsman (OIO) inspect facilities operated by or under contract with the Texas Youth Commission (TYC).

(b) All facilities operated by or under contract with TYC shall be periodically inspected by the ombudsman or assistant ombudsman.

(c) Each facility shall be evaluated for its delivery of services to youth to ensure that the rights of youth are fully observed. Inspection of a facility shall include, but is not limited to:

(1) review of education services to ensure compliance with applicable TYC policy and federal and state laws;

(2) review of facility security to ensure compliance with TYC policy;

(3) review of the general treatment program administered to youth in the facility to ensure compliance with TYC policy; and

(4) review of facility safety.

(d) Upon completion of a facility inspection, the OIO staff shall provide appropriate leadership within TYC written documentation detailing the findings of the facility inspection.

(e) OIO staff shall file with the ombudsman a complete report documenting the findings and recommendations resulting from a facility inspection and the response from TYC.

§601.15. Reporting.

(a) The ombudsman shall submit on a quarterly basis to the governor, the lieutenant governor, the state auditor, and each member of the legislature a report that is both aggregated and disaggregated by individual facility and describes:

(1) the work of the ombudsman;

(2) the results of any review or investigation undertaken by the ombudsman, including reviews or investigation of services contracted by the Texas Youth Commission (TYC); and

(3) any recommendations that the ombudsman has in relation to the duties of the ombudsman.

(b) The ombudsman shall immediately report to the governor, the lieutenant governor, the speaker of the house of representatives, the state auditor, and the office of the inspector general of TYC, any particularly serious or flagrant:

(1) case of abuse or injury of a child committed to TYC;

(2) problem concerning the administration of a TYC program or operation;

(3) problem concerning the delivery of services in a facility operated by or under contract with TYC; or

(4) interference by TYC with an investigation conducted by the Office of the Independent Ombudsman.

§601.19. Texas Youth Commission Response to Ombudsman Reports.

(a) Purpose. The purpose of this section is to establish procedures for providing the Texas Youth Commission (TYC) with an opportunity to review and comment on reports issued by the Office of the Independent Ombudsman (OIO) concerning TYC.

(b) The OIO shall accept, both before and after publication of the following OIO reports, comments from TYC concerning those reports:

(1) quarterly reports issued under Human Resources Code §64.055;

(2) reports concerning serious or flagrant circumstances issued under Human Resources Code §64.055(b); and

(3) any other formal reports containing findings and making recommendations concerning systemic issues that affect TYC.

(c) The OIO shall ensure that reports described in subsection (b) of this section are in a format to which TYC can easily respond.

(d) Pursuant to Human Resources Code §64.060(b), TYC may not submit comments after the 30th day after the date the report on which TYC is commenting is published.

(e) After receipt of comments from TYC regarding a report issued by the OIO, whether the comments are received before or after publication of the report, the ombudsman is not obligated to change the report.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 26, 2011.

TRD-201100334
Debbie Unruh
Chief Ombudsman
Office of the Independent Ombudsman of the Texas Youth Commission
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 919-5063

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 7. RAIL FACILITIES

SUBCHAPTER E. RAIL FIXED GUIDEWAY SYSTEM STATE SAFETY OVERSIGHT PROGRAM

43 TAC §§7.80 - 7.88

The Texas Department of Transportation (department) proposes new §7.80, Purpose, §7.81, Definitions, §7.82, Program Standard, §7.83, System Safety Program Plan, §7.84, System Security Plan, §7.85, Reviews, §7.86, Accident Notification and Corrective Action Plans, §7.87, Deadlines, and §7.88, Admissibility; Use of Information, all concerning the department's safety oversight of rail fixed guideway systems, and all to be contained in a new 43 TAC Chapter 7, Subchapter E, Rail Fixed Guideway System State Safety Oversight Program.

EXPLANATION OF PROPOSED NEW SECTIONS

The department proposes new Subchapter E in conjunction with the proposed amendments of §31.2, §31.3 and §31.48 and repeal of §§31.60 - 31.63, concerning the department's safety oversight of rail fixed guideway systems. The primary purpose of these actions is to move rules pertaining to the department's oversight of rail fixed guideway systems from 43 TAC Chapter 31, Public Transportation, to 43 TAC Chapter 7, Rail Facilities, in recognition that the department's Rail Division, established in December of 2009, has responsibility for the oversight program.

New Subchapter E retains the substance of Chapter 31, Subchapter F, while separating the subsections of §31.61, Rail Transit Agency Responsibilities, into new sections to improve clarity and readability. Nonsubstantive changes and additions using the language of Chapter 31, Subchapter F sections are made to improve clarity, correct internal citations, and conform to statutory requirements.

New §7.80, Purpose, carries forth the language from current 43 TAC §31.60, Purpose, without any changes.

New §7.81, Definitions, carries forth from current 43 TAC §31.3 definitions of terms used in the sections governing the department's oversight of rail transit agencies. The definition of "security" from current §31.3(68) is revised to conform to the definition found at 49 C.F.R. §659.5. A definition of "passenger," also taken from 49 C.F.R. §659.5, is added to improve the rules' clarity.

New §7.82, Program Standard, references and draws attention to the State Safety and Security Oversight Program Standard, which the department has developed and distributed in accordance with the Federal Transit Administration's rules at 49 C.F.R. §659.15.

New §7.83, System Safety Program Plan, carries forth the language from current §31.61(a), System safety program plan, and current §31.61(e), Hazard management process.

New §7.84, System Security Plan, carries forth the language from current §31.61(b), System security plan.

New §7.85, Reviews, carries forth the language from current §31.61(c), Annual reviews, and current §31.61(d), Internal safety and security reviews.

New §7.86, Accident Notification and Corrective Action Plans, carries forth the language from current §31.61(f), Accident notification, and current §31.61(g), Corrective action plans. The reference to the Director of the Public Transportation Division is replaced with a reference to the Director of the Rail Division.

New §7.87, Deadlines, carries forth the language from current §31.62, Deadlines, with corrections to the internal rule citations and changes intended to clarify that, as provided by the current §31.61(b)(1), a rail transit agency's system safety program plan and security program plan are two separate documents.

New §7.88, Admissibility; Use of Information, carries forth the language from current §31.63, Disclosure of Information, with changes intended to conform the rule to Transportation Code, §455.005(c) and (e). Specifically, the phrase, "an investigative or security report" is replaced with the phrase, "the data collected and the report of any investigation conducted by the department or contractor acting on behalf of the department, or any part of a system security plan or safety program plan that concerns security for the system." Additionally, the reference to "the department" is changed to "the state."

In new §§7.83 - 7.86, in carrying forth the language from current §31.61, the phrase, "(t)he rail transit agency" at the beginning of the rule sections or subsections is changed to "each rail transit agency," to clarify that each rail transit agency is subject to the rules.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Bill Glavin, Director, Rail Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Glavin has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be greater clarity and organization of the department's rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on new §§7.80 - 7.88 may be submitted to Bill Glavin, Director, Rail Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 14, 2011.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which provides for the oversight of rail fixed guideway systems by the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §455.005.

§7.80. Purpose.

The department is required by 49 U.S.C. §5330 to establish and carry out a safety program plan for each fixed guideway mass transportation system. Transportation Code, Chapter 455 requires the commission to establish standards for and implement state oversight of safety and security practices of rail fixed guideway systems in compliance with 49 U.S.C. §5330. The sections under this subchapter prescribe the policies and procedures governing state oversight of rail fixed guideway systems' safety and security practices.

§7.81. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Corrective action plan--A plan developed by the rail transit agency that describes the actions the rail transit agency will take to minimize, control, correct, or eliminate hazards, and the schedule for implementing those actions.

(3) Department--The Texas Department of Transportation.

(4) Fatality--A death that results from an incident and that occurs within 30 days following the incident.

(5) FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.

(6) Hazard--Any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.

(7) Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

(8) Individual--A passenger; employee; contractor; other rail transit facility worker; pedestrian; trespasser; or any person on rail transit controlled property.

(9) Injury--Any physical damage or harm that occurs to an individual as a result of an incident and that requires immediate medical attention away from the scene.

(10) Investigation--The process used to determine the causal and contributing factors of an accident or hazard, so that actions can be identified to prevent recurrence.

(11) Passenger--A person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.

(12) Passenger operations--The period of time when any aspects of rail transit agency operations are initiated with the intent to carry passengers.

(13) Property damage--The dollar amount required to replace any vehicle, whether transit or non-transit, and any property or facility damaged during an incident, or to repair it to the condition of the property or facility that existed before the incident.

(14) Rail fixed guideway system--Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

(A) is not regulated by the Federal Railroad Administration; and

(B) is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 U.S.C. §5336); or

(C) has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. §5336).

(15) Rail transit agency--An entity operating a rail fixed guideway system.

(16) Rail transit controlled property--Property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.

(17) Rail transit vehicle--The rail transit agency's rolling stock, including, but not limited to passenger and maintenance vehicles.

(18) Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(19) Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(20) Safety--Freedom from harm resulting from unintentional acts or circumstances.

(21) Security--Freedom from harm resulting from intentional acts or circumstances.

(22) System safety program plan--A document developed by the rail transit agency, describing its safety policies, objectives, responsibilities, and procedures.

(23) System security plan--A document developed by the rail transit agency describing its security policies, objectives, responsibilities, and procedures.

§7.82. Program Standard.

In accordance with 40 C.F.R. §659.15, the department has developed and distributed a State Safety and Security Oversight Program Standard, available on the department's website at http://www.txdot.gov/safety/rail.htm, or by calling the department's Rail Division at (512) 486-5230.

§7.83. System Safety Program Plan.

(a) Each rail transit agency shall develop and implement a written system safety program plan that complies with the requirements of this section. The system safety plan shall include, at a minimum, the following documents.

(1) A policy statement signed by the agency's chief executive that endorses the safety program and describes the authority that establishes the system safety program plan.

(2) A clear definition of the goals and objectives for the safety program and stated management responsibilities to ensure they are achieved.

(3) An overview of the management structure of the rail transit agency, including:

(A) an organization chart;

(B) a description of how the safety function is integrated into the rest of the rail transit organization; and

(C) clear identification of the lines of authority used by the rail transit agency to manage safety issues.

(4) The process used to control changes to the system safety program plan, including:

(A) specifying an annual assessment of whether the system safety program plan should be updated; and

(B) required coordination with the department, including timeframes for submission, revision, and approval.

(5) A description of the specific activities required to implement the system safety program, including:

(A) tasks to be performed by the rail transit safety function, by position and management accountability, specified in matrices and/or narrative format; and

(B) safety-related tasks to be performed by other rail transit departments, by position and management accountability, specified in matrices and/or narrative format.

(6) A description of the process used by the rail transit agency to implement its hazard management program, including activities for:

(A) hazard identification;

(B) hazard investigation, evaluation and analysis;

(C) hazard control and elimination;

(D) hazard tracking; and

(E) requirements for on-going reporting to the department relating to hazard management activities and status.

(7) A description of the process used by the rail transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment, which do not require formal safety certification but which may have safety impacts.

(8) A description of the safety certification process required by the rail transit agency to ensure that safety concerns and hazards are adequately addressed prior to the initiation of passenger operations for new starts and subsequent major projects to extend, rehabilitate, or modify an existing system, or to replace vehicles and equipment.

(9) A description of the process used to collect, maintain, analyze, and distribute safety data, to ensure that the safety function within the rail transit organization receives the necessary information to support implementation of the system safety program.

(10) A description of the process used by the rail transit agency to perform accident notification, investigation and reporting, including:

(A) notification thresholds for internal and external organizations;

(B) accident investigation process and references to procedures;

(C) the process used to develop, implement, and track corrective actions that address investigation findings;

(D) reporting to internal and external organizations; and

(E) coordination with the department.

(11) A description of the process used by the rail transit agency to develop an approved, coordinated schedule for all emergency management program activities, which include:

(A) meetings with external agencies;

(B) emergency planning responsibilities and requirements;

(C) process used to evaluate emergency preparedness, such as annual emergency field exercises;

(D) after action reports and implementation of findings;

(E) revision and distribution of emergency response procedures;

(F) familiarization training for public safety organizations; and

(G) employee training.

(12) A description of the process used by the rail transit agency to ensure that planned and scheduled internal safety reviews are performed to evaluate compliance with the system safety program plan, including:

(A) identification of departments and functions subject to review;

(B) responsibility for scheduling reviews;

(C) process for conducting reviews, including the development of checklists and procedures and the issuing of findings;

(D) review of reporting requirements;

(E) tracking the status of implemented recommendations; and

(F) coordination with the department.

(13) A description of the process used by the rail transit agency to develop, maintain, and ensure compliance with rules and procedures having a safety impact, including:

(A) identification of operating and maintenance rules and procedures subject to review;

(B) techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing;

(C) techniques used to assess the effectiveness of supervision relating to the implementation of operating and maintenance rules; and

(D) process for documenting results and incorporating them into the hazard management program.

(14) A description of the process used for facilities and equipment safety inspections, including:

(A) identification of the facilities and equipment subject to regular safety related inspection and testing;

(B) techniques used to conduct inspections and testing;

(C) inspection schedules and procedures; and

(D) description of how results are entered into the hazard management process.

(15) A description of the maintenance audits and inspections program, including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.

(16) A description of the training and certification program for employees and contractors, including:

(A) categories of safety-related work requiring training and certification;

(B) a description of the training and certification program for employees and contractors in safety-related positions;

(C) process used to maintain and access employee and contractor training records; and

(D) process used to assess compliance with training and certification requirements.

(17) A description of the configuration management control process, including:

(A) the authority to make configuration changes;

(B) process for making changes; and

(C) assurances necessary for formally notifying all involved departments.

(18) A description of the safety program for employees and contractors that incorporates the applicable local, state, and federal requirements, including:

(A) safety requirements that employees and contractors must follow when working on, or in close proximity to, rail transit agency property; and

(B) processes for ensuring the employees and contractors know and follow the requirements.

(19) A description of the hazardous materials program, including the process used to ensure knowledge of and compliance with program requirements.

(20) A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements; and

(21) A description of the measures, controls, and assurances in place to ensure that safety principles, requirements, and representatives are included in the rail transit agency's procurement process.

(b) Each rail transit agency shall also develop and document in its system safety program plan a process to identify and resolve hazards during its operation, including any hazards resulting from subsequent system extensions or modifications, operational changes, or other changes within the rail transit environment. The hazard management process must, at a minimum:

(1) define the rail transit agency's approach to hazard management and the implementation of an integrated systemwide hazard resolution process;

(2) specify the sources of, and the mechanisms to support, the on-going identification of hazards;

(3) define the process by which identified hazards will be evaluated and prioritized for elimination or control;

(4) identify the mechanism used to track through resolution the identified hazards;

(5) define minimum thresholds for the notification and reporting of hazards to the department; and

(6) specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the department.

§7.84. System Security Plan.

(a) Each rail transit agency shall implement a system security plan that, at a minimum, complies with requirements in this section. The system security plan must be developed and maintained as a separate document and may not be part of the rail transit agency's system safety program plan.

(b) The system security plan must, at a minimum address the following:

(1) identify the policies, goals, and objectives for the security program endorsed by the agency's chief executive;

(2) document the rail transit agency's process for managing threats and vulnerabilities during operations, and for major projects, extensions, new vehicles and equipment, including integration with the safety certification process;

(3) identify controls in place that address the personal security of passengers and employees;

(4) document the rail transit agency's process for conducting internal security reviews to evaluate compliance and measure the effectiveness of the system security plan; and

(5) document the rail transit agency's process for making its system security plan and accompanying procedures available to the department for review and approval.

§7.85. Reviews.

(a) Annual reviews.

(1) Each rail transit agency shall conduct an annual review of its system safety program plan and system security plan.

(2) In the event the rail transit agency's system safety program plan is modified, the rail transit agency must submit the modified

plan and any subsequently modified procedures to the department for review and approval.

(3) In the event the rail transit agency's system security plan is modified, the rail transit agency must make the modified system security plan and accompanying procedures available to the department for review.

(b) Internal safety and security reviews.

(1) Each rail transit agency shall develop and document a process for the performance of on-going internal safety and security reviews in its system safety program plan.

(2) The internal safety and security review process must, at a minimum:

(A) describe the process used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended;

(B) ensure that all elements of the system safety program plan and system security plan are reviewed in an ongoing manner and completed over a three-year cycle;

(C) the rail transit agency must notify the department at least thirty (30) days before the conduct of scheduled internal safety and security reviews;

(D) the rail transit agency shall submit to the department any checklists or procedures it will use during the safety portion of its review;

(E) the rail transit agency shall make available to the department any checklists or procedures subject to the security portion of its review;

(F) the rail transit agency shall submit an annual report documenting internal safety and security review activities and the status of subsequent findings and corrective actions. The security part of this report must be made available for department review;

(G) the annual report must be accompanied by a formal letter of certification signed by the rail transit agency's chief executive, indicating that the rail transit agency is in compliance with its system safety program plan and system security plan; and

(H) if the rail transit agency determines that findings from its internal safety and security reviews indicate that the rail transit agency is not in compliance with its system safety program plan or system security plan, the chief executive must identify the activities the rail transit agency will take to achieve compliance.

§7.86. Accident Notification and Corrective Action Plans.

(a) Accident notification.

(1) Each rail transit agency shall notify the department within two (2) hours of any incident involving a rail transit vehicle or taking place on rail transit controlled property where one or more of the following occurs:

(A) a fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail transit-related incident;

(B) injuries requiring immediate medical attention away from the scene for two or more individuals;

(C) property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds $25,000;

(D) an evacuation due to life safety reasons;

(E) a collision at a grade crossing;

(F) a main-line derailment;

(G) a collision with an individual on a rail right of way; or

(H) a collision between a rail transit vehicle and a second rail transit vehicle, or a rail transit non-revenue vehicle.

(2) The rail transit agencies that share track with the general railroad system and are subject to the Federal Railroad Administration notification requirements, shall notify the department within two (2) hours of an incident for which the rail transit agency must also notify the Federal Railroad Administration.

(b) Corrective action plans.

(1) Each rail transit agency must, at a minimum, develop a corrective action plan for the following:

(A) results from investigations, in which identified causal and contributing factors are determined by the rail transit agency, or the department, as requiring corrective actions; and

(B) findings from safety and security reviews performed by the department.

(2) Each corrective action plan should identify the action to be taken by the rail transit agency, an implementation schedule, and the individual or department responsible for the implementation.

(3) The corrective action plan must be reviewed and formally approved by the department.

(4) The rail transit agency must provide the department:

(A) verification that the corrective action(s) has been implemented as described in the corrective action plan, or that a proposed alternate action has been implemented subject to department review and approval; and

(B) periodic reports requested by the department, describing the status of each corrective action not completely implemented, as described in the corrective action plan.

(5) In the event of a dispute concerning the department's decision related to a corrective action plan, a rail transit agency shall submit an application for administrative review to the following address: Director, Rail Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483. The application for administrative review shall be submitted no later than 30 days after receipt of the written decision.

(A) Application. The application for administrative review shall, at a minimum:

(i) state and explain the relief requested;

(ii) state and explain all relevant facts; and

(iii) state and explain the legal basis for the relief sought.

(B) Decision. The division director shall decide whether to grant, grant in part, or deny the application. If an applicant does not provide information sufficient to evaluate the application, the application shall be denied. The applicant is not entitled to a contested case hearing, and there is no right to appeal the decision of the division director.

§7.87. Deadlines.

A rail transit agency shall submit to the department:

(1) prior to beginning revenue service, a system safety program plan required by §7.83 of this subchapter (relating to System

Safety Program Plan) and a system security plan required by §7.84 of this subchapter (relating to System Security Plan);

(2) by February 1 of each year, a written report of its annual internal safety audit conducted as required by §7.85(b) of this subchapter (relating to Reviews);

(3) by February 1 of each year, a certification, signed by the rail transit agency's chief executive, that the rail transit agency is in compliance with its system safety program plan and system security plan;

(4) by February 1 of each year, a written report of the rail transit agency's safety activities for the preceding 12 months as required by §§7.83 - 7.86 of this subchapter; and

(5) by February 1 of each year, a certification signed by the rail transit agency's chief executive, that the rail transit agency is in compliance with the provisions of this subchapter.

§7.88. Admissibility; Use of Information.

The data collected and the report of any investigation conducted by the department or a contractor acting on behalf of the department, or any part of a system security plan or safety program plan that concerns security for the system, may not be admitted in evidence or used for any purpose in any action or proceeding arising out of any matter referred to in an investigation except in an action or a proceeding instituted by the state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100370
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER M. TRAFFIC SAFETY PROGRAM

43 TAC §§25.901 - 25.903, 25.906

The Texas Department of Transportation (department) proposes amendments to §25.901, Purpose, §25.902, Definitions, §25.903, Scope, and §25.906, Participation, all concerning the traffic safety program.

EXPLANATION OF PROPOSED AMENDMENTS

In November 2007 the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. Since that date the commission has taken action to discourage fraudulent and illegal activity by certain persons who receive financial assistance from or contract with the department by requiring them to adopt and enforce ethics and compliance programs. Those requirements now apply to transportation corporations (43 TAC §15.92(c)), Regional Mobility Authorities (43 TAC §26.56), entities receiving funds from the department for toll facilities (43 TAC §27.53), and entities receiving funds from the department for public transportation (43 TAC §31.39).

The new provision expands the use of that concept to require an entity that receives Texas Traffic Safety Program Funds to have and enforce compliance with an internal ethics and compliance program. Texas Traffic Safety Program Funds are awarded under traffic safety program contracts and traffic safety program agreements. A traffic safety program contract is a contract between the department and another state agency for the procurement of goods or services for a traffic safety project. A traffic safety program agreement is a contract between the department and another state agency, a college, university, local government, public or private for-profit or nonprofit organization, or individual for the implementation of a traffic safety project.

The amendments to §§25.901 - 25.903 change "undesignated head" and associated references to "this subchapter" to conform to currently used language. No substantive change is made to the sections.

The amendments to §25.906, Participation, redesignate the current wording as subsection (a) and add a new subsection (b). Traffic safety staff who were formerly part of the department's district offices are now part of the Traffic Operations Division. Amendments to paragraphs (1) and (2) combine the language to reflect current department organization and the current practice for proposal submission to the department. Subsequent paragraphs are renumbered. New subsection (b) requires an entity to adopt and enforce an internal ethics and compliance program that satisfies the requirements of 43 TAC §10.51 (Internal Ethics and Compliance Program) in order to be eligible to receive traffic safety funds. The change is applicable only for grant agreements entered into after January 1, 2012.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Steve Simmons, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Simmons has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to ensure that recipients of traffic safety program funds have in place and are following an internal compliance program thereby reducing the possible misuse of those funds. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§25.901 - 25.903 and §25.906 may be submitted to Steve Simmons, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§25.901. Purpose.

The purpose of [~~the sections in~~] this subchapter [~~undesignated head~~] is to provide an orderly and efficient system of traffic safety program grant agreements or contracts between the department and local governments, state agencies, colleges, universities, individuals, and other public and private entities for the purpose of improving traffic safety and to facilitate compliance with applicable federal and state laws. This subchapter [~~These sections~~] shall be construed to obtain these objectives.

§25.902. Definitions.

The following words and terms, when used in this subchapter [~~undesignated head~~], shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Transportation Commission.

(2) Common rule--Title 49, United States Code of Federal Regulations, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments.

(3) Contract--A Texas traffic safety program contract between the department and another state agency for the procurement of goods or services for a traffic safety project, and including expenditures pursuant to which are reimbursable, in whole or in part, by the department with traffic safety funds.

(4) Department--The Texas Department of Transportation.

(5) District--One of the 25 geographical areas into which the department divides the state.

(6) DOT--The United States Department of Transportation.

(7) FHWA--The Federal Highway Administration.

(8) Grant agreement--A Texas traffic safety program agreement between a subgrantee and the department for the implementation of a traffic safety project which includes an approved project description and planned expenditures reimbursable, in whole or in part, by the department with traffic safety funds.

(9) Local government--A county, city, incorporated village or town, council of government, or other jurisdiction existing, created, or organized under general, home-rule, or special laws of the state.

(10) Monitoring--Project review and documentation that provides a method of tracking fiscal management and progress toward achievement of objectives.

(11) National Highway Traffic Safety Administration (NHTSA)--A federal administration in DOT, which is responsible for the administrative oversight of traffic safety funds and programs among the various states.

(12) Program--The Texas Traffic Safety Program consisting of a coordinated program planned and administered by the department under the Federal Highway Safety Act of 1966 and the Texas Traffic Safety Act of 1967.

(13) Project--An activity or group of related activities having one or more defined objectives for improving traffic safety, a detailed plan for implementation, a schedule with milestones, a budget, and a method of evaluating accomplishments.

(14) Prospective contractor--Any state agency, college, university, local government, public or private for-profit or nonprofit organization, or individual (other than the department) which is designated as a party in an approved contract.

(15) State--The State of Texas.

(16) State agency--A state office, officer, department, division, bureau, board, commission, legislative committee, authority, institution, or a subdivision of one of these entities.

(17) Subgrantee--Any state agency, college, university, local government, public or private for-profit or nonprofit organization, or individual that receives traffic safety grant funds from the department, and which is accountable to the department for the use of the funds provided.

(18) Texas highway safety plan--The document which identifies the state's traffic safety problems and describes the programs and projects to address those problems. It serves as the basis for the execution of a federal-aid agreement.

(19) Uniform Grant and Contract Management Standards--The standards included in Chapter 783, Texas Government Code, concerning uniform grant and contract management standards for state agencies.

§25.903. Scope.

This subchapter governs [~~The sections under this undesignated head govern~~] the scope and content of program grant agreements and contracts and the means of determining whether costs of a proposed project will be eligible for reimbursement with traffic safety funds pursuant to a grant agreement or a contract with the department. They shall not be construed to enlarge, diminish, modify, or alter the power or authority of the department or any substantive rights of any person, organization, or political jurisdiction. This subchapter does [~~The sections under this undesignated head do~~] not apply to purchase order contracts awarded in accordance with Government Code, Chapter 2155.

§25.906. Participation.

(a) Any prospective subgrantee with traffic safety responsibility may have its project proposal considered for inclusion in the Texas highway safety plan.

(1) Local governments wishing to submit a project proposal should contact the traffic safety section of the traffic operations division regarding their project proposals [~~district office responsible for the geographic area in which they are located~~].

[~~(2) Other subgrantees may contact the traffic safety section of the traffic operations division regarding their project proposals.~~]

(2) [~~(3)~~] These proposals will be considered for inclusion in the Texas highway safety plan during the planning period which generally begins a year or more prior to the projected date of implementation for the project proposals.

(3) [~~(4)~~] Approval of federal funding for the Texas highway safety plan is normally not received by the department until just prior to the beginning of each federal fiscal year, which begins on October 1. In some instances the full amount of funding available for a given fiscal year is not known until after October 1 of that year. For this reason, the department may be unable to determine if a particular project proposal will be funded until after the beginning of the fiscal year in which it is to be implemented.

(4) [~~(5)~~] Except for those projects funded according to legislative or regulatory requirements, grant funding will be awarded according to the following criteria:

(A) potential for impact on traffic safety;

(B) quality of problem identification, supported by verifiable information or statistical data;

(C) demonstration of a reasonable and logical solution for improving traffic safety; and

(D) cost effectiveness.

(b) To be eligible to receive traffic safety funds under a grant agreement entered into after January 1, 2012, an entity must have adopted an internal ethics and compliance program that satisfies the requirements of §10.51 of this title (relating to Internal Ethics and Compliance Program) and must enforce compliance with that program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100371
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER O. CRASH RECORDS INFORMATION SYSTEM

43 TAC §25.977

The Texas Department of Transportation (department) proposes amendments to §25.977, concerning reporting of motor vehicle crashes by investigating officers.

EXPLANATION OF PROPOSED AMENDMENTS

Law enforcement officers who investigate motor vehicle crashes are required by Transportation Code, §550.062 to submit a crash report to the department within 10 days of the crash on a form prescribed by the department if the crash resulted in injury to or death of a person or $1,000 or more of property damage. The form used for the report is referred to as the Texas Peace Officer's Crash Report, or more commonly as the CR-3.

Under the proposed revisions to §25.977, Reporting by Investigating Officers, the Texas Transportation Commission (commission) proposes to adopt a second version of the Form CR-3 by reference. The rule states that a law enforcement officer may use either the existing version of Form CR-3 or the revised version, the CR-3 Alternate, to report motor vehicle crash information.

The department developed the current version of the CR-3 after extensive consultation with the law enforcement community through a crash records working group and after consultation with the Texas Department of Public Safety. The current version of the CR-3 was also approved by both the working group and the Department of Public Safety. The department adopted the current version of crash reporting form in January of 2010.

The department has received some complaints on the current form and requested that the Center for Transportation Safety at the Texas Transportation Institute (CTS-TTI) conduct two surveys of law enforcement agencies concerning implementation of the current form. The survey indicated that some of the law enforcement community found the current version of the Form CR-3 to be both more confusing and time consuming than previous versions. These surveys indicate that some law enforcement officers and agencies believe that use of the current form has resulted in a significant increase in completion time, more inaccurate data collection, and an increased level of frustration on the part of the officers completing the form. However, many of the survey respondents wished to continue using the current version of the form.

One of the primary issues identified by law enforcement agencies with the current Form CR-3 was that officers needed to refer to a separate code sheet to complete the form. The department sought to alleviate this problem by providing tools for the officer's use such as plastic clipboards printed with the necessary codes. Based on the survey these actions have not been sufficient to eliminate all of the officer complaints.

CTS-TTI recommended that the department take a combined approach to resolve the issues by offering two versions of the CR-3 crash reporting form. Based on this recommendation the department proposes to adopt an additional CR-3 form, the CR-3 Alternate, containing the most commonly used data codes printed directly on the form. This form contains all the same data fields as the current CR-3 form. It does not require the gathering of any additional information. It also does not delete any data fields required on the current form. The difference between the two forms is that the CR-3 form is two pages long and requires the use of a code sheet and the CR-3 Alternate form is four pages and includes the codes on the form in the relevant places.

Section 25.977(d) provides that the commission is adopting Form CR-3 Alternate by reference. The adoption of this form will allow the department to offer two versions of the form to be used for gathering crash information. In addition the rule provides that a law enforcement officer or agency can use either form. This language is included to make it clear that the choice of form is up to the agency or law enforcement officer.

Subsection (f) is also amended to indicate that both forms will be available through the department website address.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Carol Rawson, P.E., Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Rawson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be more efficient reporting of crash data to the state and more accurate crash data. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation

will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on Thursday, March 10, 2011, in the Ric Williamson Hearing Room, First Floor, Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137, at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §25.977, as well as proposed revisions to the CR-3 Alternate form, may be submitted to Carol Rawson, P.E., Director, Traffic Operations Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code, §550.064, which authorizes the department to prescribe the form of motor vehicle crash reports.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 550.

§25.977. Reporting by Investigating Officers.

(a) A law enforcement officer who investigates a motor vehicle crash shall submit a crash record report within 10 days of the accident on a form prescribed by the department if the crash resulted in:

(1) injury to or death of a person;

(2) $1000 or more of property damage to the property of any one person.

(b) The crash record report form must include:

(1) information about the crash;

(2) information about all vehicles involved in the crash;

(3) information about each person involved in the crash; and

(4) other factors necessary for the department to comply with state and federal reporting requirements.

(c) The department has developed Form CR-3, Texas Peace Officer's Crash Report, to satisfy the requirements of subsection (b) of this section. The commission adopts Form CR-3 by reference. [~~The form is available through the department's website at *www.txdot.gov.*~~]

(d) The department also has developed Form CR-3 Alternate, Texas Peace Officer's Alternate Crash Report, to satisfy the requirements of subsection (b) of this section and provide an alternate format that the investigating officer or the officer's law enforcement agency may choose for reporting the required information. The commission adopts Form CR-3 Alternate by reference.

(e) The forms are available through the department's website at *www.txdot.gov.*

(f) [~~(d)~~] Incomplete or inaccurate crash reports, with the exception of location information as described in §25.974(b) of this subchapter (relating to Officer Accident Report Modifications), will be returned to the originating law enforcement agency for correction.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100372
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) proposes amendments to §31.2, Organization, §31.3, Definitions, and §31.48, Project Oversight, and the repeal of Subchapter F, Rail Fixed Guideway System State Safety Oversight Program, §§31.60 - 31.63, all concerning the department's safety oversight of rail fixed guideway systems.

EXPLANATION OF PROPOSED AMENDMENTS AND REPEALS

The department proposes the amendments to §31.2, §31.3, and §31.48 and repeal of §§31.60 - 31.63 in conjunction with its proposed new Subchapter E, Rail Fixed Guideway System State Safety Oversight Program, of 43 TAC Chapter 7. The primary purpose of these actions is to move rules pertaining to the department's oversight of rail fixed guideway systems from 43 TAC Chapter 31, Public Transportation, to 43 TAC Chapter 7, Rail Facilities, in recognition that the department's Rail Division, established in December of 2009, has responsibility for the oversight program.

Amendments to §31.2(4) remove the rail oversight function from the Public Transportation Division's responsibilities, as this function is now performed by the Rail Division. Subsequent paragraphs in §31.2 are renumbered.

Amendments to §31.3, Definitions, remove definitions of terms that are no longer used in Chapter 31 and redesignate the definitions appropriately.

Amendments to §31.48(b) remove paragraph (7) related to the Rail Transit Agency Report reporting requirement from the Public Transportation Division, as this function is now performed by the Rail Division. Subsequent paragraphs in §31.48 are renumbered.

Subchapter F, composed of §31.60, Purpose, §31.61, Rail Transit Agency Responsibilities, §31.62, Deadlines, and §31.63, Disclosure of Information, Rail Fixed Guideway System State Safety Oversight Program, is repealed. The requirements of that subchapter are simultaneously proposed as new sections in 43 TAC Chapter 7. This reflects the shift of the responsibility for rail safety from the department's Public Transportation Division to the Rail Division.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and repeals.

Eric Gleason, Director, Public Transportation Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and repeals.

PUBLIC BENEFIT AND COST

Mr. Gleason has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and repeals will be a more efficient resource of administrative rules by moving the rail rules to a single location in the administrative code. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§31.2, 31.3, and 31.48, and the repeal of §§31.60 - 31.63, may be submitted to Eric Gleason, Director, Public Transportation Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on March 14, 2011.

SUBCHAPTER A. GENERAL

43 TAC §31.2, §31.3

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which provides for the oversight of rail fixed guideway systems by the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §455.005.

§31.2. Organization.

The Public Transportation Division is responsible for:

(1) preparing and updating a statewide comprehensive master plan for public transportation;

(2) providing financial assistance through appropriate communication and the establishment of procedures for the development and processing of applications;

(3) assisting local entities in securing financial aid offered by the federal government for the purpose of establishing, maintaining, or expanding public transportation systems;

[~~(4) carrying out the Federal Transit Administration (FTA) rail safety oversight program;~~]

(4) [~~(5)~~] administering the state public transportation funds and other monies appropriated by the Texas Legislature for public transportation purposes and established within the department budget, in accordance with all federal, state, and local laws, statutes, ordinances, rules, and regulations;

(5) [~~(6)~~] providing technical assistance to district personnel and local jurisdictions;

(6) [~~(7)~~] representing the state in public transportation matters with federal officials, other state agencies, transit organizations, and local communities;

(7) [~~(8)~~] monitoring and sponsoring research and development activities to enhance public transportation development;

(8) [~~(9)~~] assisting in the development of policies by the commission, the governor, and the legislature; and

(9) [~~(10)~~] encouraging the coordination of public transportation services to eliminate waste, to generate efficiencies that will permit increased levels of service, and to further the state's efforts to reduce air pollution.

§31.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative expenses--Include, but are not limited to, general administrative expenses such as salaries of the project director, secretary, and bookkeeper; insurance premiums or payments to a self-insurance reserve; office supplies; facilities and equipment rental; and standard overhead rates.

(2) Allocation--A preliminary distribution of grant funds representing the maximum amount to be made available to a subrecipient during the fiscal year, subject to the subrecipient's completion of and compliance with all application requirements, rules, and regulations applicable to the specific funding program.

(3) Authority--A metropolitan or regional authority created under Transportation Code, Chapter 451 or 452, a city transit department created under Transportation Code, Chapter 453, by a municipality having a population of not less than 200,000 according to the most recent federal census, or a coordinated county authority created under Transportation Code, Chapter 460.

(4) Average revenue vehicle capacity--The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(5) Capital expenses--Include the acquisition, construction, and improvement of public transit facilities and equipment needed for a safe, efficient, and coordinated public transportation system.

(6) Commission--The Texas Transportation Commission.

(7) Common rule--49 CFR Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State

and Local Governments or 49 CFR Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations.

(8) Contractor--A recipient of public transportation funds through a contract or grant agreement with the department.

[~~(9) Corrective action plan--A plan developed by the rail transit agency that describes the actions the rail transit agency will take to minimize, control, correct, or eliminate hazards, and the schedule for implementing those actions.~~]

(9) [~~(10)~~] Department--The Texas Department of Transportation.

(10) [~~(11)~~] Deputy executive director--The deputy executive director of the department.

(11) [~~(12)~~] Designated recipient--The state, an authority, a municipality that is not included in an authority, a local governmental body, or a nonprofit entity providing rural public transportation services, that receives federal or state public transportation money through the department or the Federal Transit Administration, or its successor.

(12) [~~(13)~~] Director--The director of public transportation for the department.

(13) [~~(14)~~] District--One of the 25 districts of the department having responsibility for administration of public transportation programs in a designated geographic area.

(14) [~~(15)~~] District engineer--The chief executive officer in charge of a district.

(15) [~~(16)~~] Employment-related transportation--Transportation to support services that assist individuals in job search or job preparation. Trips to daycare centers, one-stop workforce centers, jobs interviews, and vocational training are examples.

(16) [~~(17)~~] Equipment--Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(17) [~~(18)~~] Executive director--The executive director of the department.

(18) [~~(19)~~] Farebox revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be farebox revenues.

[~~(20) Fatality--A death that results from an incident and that occurs within 30 days following the incident.~~]

(19) [~~(21)~~] Federally funded project--A public transportation project that is being funded in part under the provisions of the Federal Transit Act, as amended, 49 USC §5301 et seq., the Federal-Aid Highway Act of 1973, as amended, 23 USC §101 et seq., or any other federal program for funding public transportation.

(20) [~~(22)~~] Fiscal year--The state accounting period of 12 months that begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

[~~(23) FRA--The Federal Railroad Administration, an agency of the United States Department of Transportation.~~]

(21) [~~(24)~~] FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.

(22) [~~(25)~~] Good standing--A status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

[~~(26) Hazard--Any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.~~]

(23) [~~(27)~~] Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

[~~(28) Individual--A passenger; employee; contractor; other rail transit facility worker; pedestrian; trespasser; or any person on rail transit controlled property.~~]

[~~(29) Injury--Any physical damage or harm that occurs to an individual as a result of an incident and that requires immediate medical attention away from the scene.~~]

[~~(30) Investigation--The process used to determine the causal and contributing factors of an accident or hazard, so that actions can be identified to prevent recurrence.~~]

(24) [~~(31)~~] Job access project--A public transportation project relating to the development and maintenance of transportation services designed to transport welfare recipients and eligible low-income individuals to and from jobs and activities related to their employment, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

(25) [~~(32)~~] Like-kind exchange--The trade-in or sale of a transit vehicle before the end of its useful life to acquire a replacement vehicle of like kind.

(26) [~~(33)~~] Local funds--Directly generated funds, as defined in the latest edition of the Federal Transit Administration National Transit Database Reporting Manual. Examples include, but are not limited to, passenger fares, special transit fares, purchased transportation fares, park and ride revenue, other transportation revenue, charter service revenue, freight tariffs, station and vehicle concessions, advertising revenue, funds dedicated to transit at their source, taxes, cash contributions, contract revenue, general revenue, and in-kind contributions.

(27) [~~(34)~~] Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, metropolitan transit authority, coordinated county transportation authority, or regional transit authority.

(28) [~~(35)~~] Local public body--Includes cities, counties, and other political subdivisions of states; public agencies; and instrumentalities of one or more states, municipalities, or political subdivisions of states.

(29) [~~(36)~~] Local share requirement--The amount of funds required and eligible to match federally funded projects for the improvement of public transportation.

(30) [~~(37)~~] Low income individual--An individual whose family income is at or below 150 percent of the poverty line, as that term is defined in the Community Services Block Grant Act (42 USC §9902(2)), including any revision required by that section, for a family of the size involved, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

(31) [~~(38)~~] Mobility management--Eligible capital expenses consisting of short-range planning and management activities and projects for improving coordination among public transportation

and other transportation-service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a government entity, under 49 USC Section 5301 et seq. (other than Section 5309). Mobility management excludes operating public transportation services.

(32) [~~(39)~~] MPO--Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(33) [~~(40)~~] Net operating expenses--Those expenses that remain after farebox revenues are subtracted from eligible operating expenses.

(34) [~~(41)~~] New public transportation services or alternatives--An activity that, with respect to the New Freedom program:

(A) is targeted toward people with disabilities;

(B) is beyond the ADA requirements;

(C) meets the intent of the program by removing barriers to transportation and assisting persons with disabilities with transportation, including transportation to and from jobs and employment services; and

(D) is not included in a Transportation Improvement Program or Statewide Transportation Improvement Program prior to August 10, 2005.

[~~(42) New starts project--Any rail fixed guideway system funded under FTA's 49 USC §5309 discretionary construction program.~~]

(35) [~~(43)~~] Nonprofit organization--A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 USC §501(c), one that is exempt from taxation under 26 USC §504(a) or §101, or one that has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the nonprofit organization.

(36) [~~(44)~~] Nonurbanized area--An area outside an urbanized area.

(37) [~~(45)~~] Obligated funds--Monies made available under a valid, unexpired contract or grant agreement between the department and a public transportation subrecipient.

(38) [~~(46)~~] Operating expenses--Costs directly related to system operations of a transit agency regardless of the category of funding. At a minimum, this definition includes:

(A) fuel, oil, replacement tires, replacement parts that do not meet the criteria for capital items, drivers' and mechanics' salaries and fringe benefits, dispatchers' salaries, and licenses;

(B) maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism; and

(C) expenses funded with capital or administrative funds, including preventative maintenance, provision of paratransit service under the Americans with Disability Act (ADA), capital cost of contracting, and insurance.

[~~(47) Passenger operations--The period of time when any aspects of rail transit agency operations are initiated with the intent to carry passengers.~~]

(39) [~~(48)~~] Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivisions of the state; public agencies or instrumentalities of one or more states; Indian tribes (except private nonprofit corporations formed by Indian tribes); public corporations, boards, or commissions established under the law of any state; or entities subject to control by public authority, whether state or municipal.

[~~(49) Program standard--A written document developed and distributed by the oversight agency, that describes the policies, objectives, responsibilities, and procedures used to provide rail transit agency safety and security oversight.~~]

(40) [~~(50)~~] Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

[~~(51) Property damage--The dollar amount required to replace any vehicle, whether transit or non-transit, and any property or facility damaged during an incident, or to repair it to the condition of the property or facility that existed before the incident.~~]

(41) [~~(52)~~] Public transportation--Transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance by a governmental entity or by a private entity if the private entity receives financial assistance for that conveyance from any governmental entity. This definition includes fixed guideway transportation and underground transportation, but excludes services provided by aircraft, ambulances, and emergency vehicles.

[~~(53) Rail transit accident--An incident involving a rail fixed guideway transit vehicle or taking place on rail fixed guideway transit controlled property where one or more of the following occurs:~~]

[~~(A) a fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail fixed guideway transit-related incident;~~]

[~~(B) injuries requiring immediate medical attention away from the scene for two or more individuals;~~]

[~~(C) property damage to rail fixed guideway transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds $25,000;~~]

[~~(D) an evacuation due to life safety reasons;~~]

[~~(E) a collision at a grade crossing;~~]

[~~(F) a main-line derailment;~~]

[~~(G) a collision with an individual on a rail fixed guideway right of way; or~~]

[~~(H) a collision between a rail fixed guideway transit vehicle and a second rail fixed guideway transit vehicle, or a rail fixed guideway transit non-revenue vehicle.~~]

[~~(54) Rail transit agency--An entity operating a rail fixed guideway system.~~]

[~~(55) Rail transit contractor--An entity that performs tasks required on behalf of the oversight or rail transit agency. The fixed guideway system may not be a contractor for the oversight agency.~~]

[~~(56) Rail transit controlled property--Property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.~~]

[~~(57) Rail transit fixed guideway system--Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway, as determined by the FTA, that:~~]

[~~(A) is not regulated by the Federal Railroad Administration; and~~]

[~~(B) is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 USC §5336); or~~]

[~~(C) has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 USC §5336).~~]

[~~(58) Rail transit passenger--A person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.~~]

[~~(59) Rail transit vehicle--The rail transit agency's rolling stock, including, but not limited to passenger and maintenance vehicles.~~]

(42) [~~(60)~~] Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(43) [~~(61)~~] Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(44) [~~(62)~~] Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(45) [~~(63)~~] Reverse commute project--A public transportation project designed to transport residents of urbanized areas and other than urbanized areas to suburban employment opportunities, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

(46) [~~(64)~~] Ridership--Unlinked passenger trips.

(47) [~~(65)~~] Rural public transportation (RPT)--A generic term used to identify subrecipients who provide service in nonurbanized areas.

(48) [~~(66)~~] Rural transit district--A political subdivision of the state that provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458.

[~~(67) Safety--Freedom from harm resulting from unintentional acts or circumstances.~~]

[~~(68) Security--Freedom from harm resulting from intentional acts or circumstances. Intentional danger includes crimes and must be reported to the department if the intentional act meets the thresholds for notification.~~]

(49) [~~(69)~~] Stakeholders--All individuals or groups that are potentially affected by transportation decisions. Examples include public agencies, representatives of transportation agency employees or other affected employees, private providers of transportation, non-governmental agencies, local businesses, persons in diverse and traditionally underserved communities, and other interested parties.

(50) [~~(70)~~] Strategic priorities--Projects that the commission has determined will:

(A) stabilize funding levels;

(B) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or

(C) advance the level of coordination among transportation service providers, and among transportation service providers and health and human services agencies.

(51) [~~(71)~~] Subrecipient--An entity that receives state or federal transportation funding from the department, rather than directly from FTA or other state or federal funding source.

[~~(72) System safety program plan--A document developed by the rail transit agency, describing its safety policies, objectives, responsibilities, and procedures.~~]

[~~(73) System security plan--A document developed by the rail transit agency describing its security policies, objectives, responsibilities, and procedures.~~]

(52) [~~(74)~~] Uniform grant and contract management standards--The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(53) [~~(75)~~] U.S. DOT--United States Department of Transportation.

(54) [~~(76)~~] Unlinked passenger trips--The number of passengers who board public transportation vehicles. A passenger is counted each time the passenger boards a vehicle even though the passenger might be on the same journey from origin to destination.

(55) [~~(77)~~] Urban transit district--In accordance with Transportation Code, Chapter 458, a local governmental body or a political subdivision of the state that operates a public transportation system in an urbanized area with a population between 50,000 and 200,000, according to the most recent federal census. This definition includes small urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994.

(56) [~~(78)~~] Urbanized area--A core area and the surrounding densely populated area with a population of 50,000 or more, with boundaries fixed by the United States Census Bureau.

(57) [~~(79)~~] Vehicle miles--The miles a vehicle travels while in revenue service, plus deadhead miles. This definition excludes miles a vehicle travels for charter service, school bus service, operator training, or maintenance testing.

(58) [~~(80)~~] Vehicle revenue hours or miles--The hours or miles a vehicle travels while in revenue service. This definition includes layover and recovery, but excludes travel to and from storage facilities, the training of operators prior to revenue service, road tests, deadhead travel, and school bus and charter service.

(59) [~~(81)~~] Vehicle utilization--Average daily passenger trips per revenue vehicle, divided by average revenue vehicle capacity. This definition provides a measure of an individual system's ability to use existing seating capacity.

(60) [~~(82)~~] Welfare recipient--An individual who has received assistance under a state or tribal program funded under the Social Security Act, Title IV, Part A, at any time during the previous three year period, or as otherwise defined by 49 USC §5316, the Job Access and Reverse Commute program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100373
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §31.48

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which provides for the oversight of rail fixed guideway systems by the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §455.005.

§31.48. Project Oversight.

(a) (No change.)

(b) Reporting requirements. The subrecipient shall submit reports to the department in a format prescribed by the department within deadlines established by the department.

(1) - (6) (No change.)

[~~(7) Rail Transit Agency Report. Rail Transit Agency Reports shall be submitted in accordance with §31.61 of this chapter.~~]

(7) [~~(8)~~] Miscellaneous reports. Entities receiving funds from either the department or the FTA shall cooperate with the department in providing other information as requested by state and federal funding agencies.

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100374
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER F. RAIL FIXED GUIDEWAY SYSTEM STATE SAFETY OVERSIGHT PROGRAM

43 TAC §§31.60 - 31.63

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §455.005, which provides for the oversight of rail fixed guideway systems by the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §455.005.

§31.60. Purpose.

§31.61. Rail Transit Agency Responsibilities.

§31.62. Deadlines.

§31.63. Disclosure of Information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100375
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 463-8683

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PART 3. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

CHAPTER 57. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

43 TAC §57.28

The Automobile Burglary and Theft Prevention Authority (ABTPA) proposes an amendment to Chapter 57, §57.28, relating to Conditions for Withholding Funds from Grantees. The proposed amendments to §57.28 include language to withhold funding from a grantee who does not provide a response to an audit or progress monitoring. Currently, grantees are not expressly required to provide a written response to audit findings. The proposed change is to better ensure compliance with grant requirements and to assist grantees with projects. The change in rule requires a response from a grantee to monitoring

and auditing. The amendments place grantees on notice that funding may be withheld if a response is not submitted or if there are deficiencies found in a project. Other conforming changes are made to the section for consistency and clarity.

Charles Caldwell, Director of the ABTPA, has determined that for the first five-year period the amendments are in effect, there will be no additional fiscal implications for state and local governments as a result of enforcing or administering the proposed amendments.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated will be better monitoring of grantees' progress in reducing auto theft and burglary. The expenditure and accountability for use of state funds will be accurate and reported consistently with the statewide reporting.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, there is no anticipated economic costs to persons required to comply with the amendments as proposed. There is no effect on a local economy. There is no anticipated adverse economic effect on micro or small businesses as a result of the proposed amendments.

Comments on the proposed amendments may be submitted to Charles Caldwell, Director, Automobile Burglary and Theft Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731, for a period of 30 days from the date that the proposed amendments are published in the *Texas Register.*

The amendments are proposed under Texas Civil Statutes, Article 4413(37), §6(a), which the ABTPA interprets as authorizing it to adopt rules implementing its statutory powers and duties.

The following are the statutes, articles, or codes affected by the amendments: Article 4413(37), §6(a)

§57.28. Conditions for Withholding Funds from Grantees.

(a) Withholding funds from specific projects. Funds may be withheld from a specific project for reasons which include, but are not limited to, the following:

(1) (No change.)

(2) failure to submit reports of expenditures and status of funds, grantee's progress reports, special required reports or a written response to audit and progress monitoring findings, on or before a given deadline [~~at the times~~] and in the form established for such reporting;

(3) - (6) (No change.)

(b) Withholding funds from all projects. Funds may be withheld from all projects operated by a grantee for reasons which include, but are not limited to, the following:

(1) failure to respond to any deficiency listed in this section and for deficiencies found by ABTPA as a result of monitoring or audit;

(2) - (3) (No change.)

(c) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 26, 2011.

TRD-201100325
Charles Caldwell
Director
Automobile Burglary and Theft Prevention Authority
Earliest possible date of adoption: March 13, 2011
For further information, please call: (512) 374-5101

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 355. NON-SECURE JUVENILE CORRECTIONAL FACILITIES

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§355.100, 355.102, 355.104, 355.106, 355.108, 355.110

The Texas Juvenile Probation Commission withdraws proposed new §§355.100, 355.102, 355.104, 355.106, 355.108, and 355.110 which appeared in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10922).

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100340
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 27, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER B. PHYSICAL PLANT

37 TAC §§355.200, 355.202, 355.204, 355.206, 355.208, 355.210, 355.212, 355.214, 355.216, 355.218, 355.220, 355.222, 355.224, 355.226, 355.228

The Texas Juvenile Probation Commission withdraws proposed new §§355.200, 355.202, 355.204, 355.206, 355.208, 355.210, 355.212, 355.214, 355.216, 355.218, 355.220, 355.222, 355.224, 355.226, and 355.228 which appeared in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10922).

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100355
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 27, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER C. POLICIES AND PROCEDURES

37 TAC §§355.300, 355.302, 355.304, 355.306, 355.308, 355.310, 355.312, 355.314, 355.316, 355.318, 355.320, 355.322, 355.324, 355.326, 355.328, 355.330, 355.332, 355.334, 355.336, 355.338, 355.340, 355.342, 355.344, 355.346, 355.348, 355.350, 355.352, 355.354, 355.356

The Texas Juvenile Probation Commission withdraws proposed new §§355.300, 355.302, 355.304, 355.306, 355.308, 355.310, 355.312, 355.314, 355.316, 355.318, 355.320, 355.322, 355.324, 355.326, 355.328, 355.330, 355.332, 355.334, 355.336, 355.338, 355.340, 355.342, 355.344, 355.346, 355.348, 355.350, 355.352, 355.354, and 355.356 which appeared in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10922).

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100356
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 27, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER D. RESIDENT HEALTH AND SAFETY

37 TAC §§355.400, 355.402, 355.404, 355.406, 355.408, 355.410, 355.412, 355.414, 355.416, 355.418

The Texas Juvenile Probation Commission withdraws proposed new §§355.400, 355.402, 355.404, 355.406, 355.408, 355.410, 355.412, 355.414, 355.416, and 355.418 which appeared in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10922).

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100357
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 27, 2011
For further information, please call: (512) 424-6710

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SUBCHAPTER E. RESIDENT RIGHTS AND PROGRAMMING

37 TAC §§355.500, 355.502, 355.504, 355.506, 355.508, 355.510, 355.512, 355.514, 355.516, 355.518, 355.520, 355.522, 355.524, 355.526, 355.528, 355.530, 355.532, 355.534, 355.536, 355.538, 355.540, 355.542, 355.544, 355.546, 355.548, 355.550, 355.552, 355.554, 355.556, 355.558, 355.560, 355.562, 355.564, 355.566, 355.568, 355.570, 355.572, 355.574, 355.576, 355.578, 355.580

The Texas Juvenile Probation Commission withdraws proposed new §§355.500, 355.502, 355.504, 355.506, 355.508, 355.510, 355.512, 355.514, 355.516, 355.518, 355.520, 355.522, 355.524, 355.526, 355.528, 355.530, 355.532, 355.534, 355.536, 355.538, 355.540, 355.542, 355.544, 355.546, 355.548, 355.550, 355.552, 355.554, 355.556, 355.558, 355.560, 355.562, 355.564, 355.566, 355.568, 355.570, 355.572, 355.574, 355.576, 355.578, and 355.580 which appeared in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10922).

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100358
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: January 27, 2011
For further information, please call: (512) 424-6710

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 28. TEXAS AGRICULTURAL FINANCE AUTHORITY

SUBCHAPTER C. AGRICULTURAL LOAN GUARANTEE PROGRAM

4 TAC §28.37

The Texas Department of Agriculture (department), on behalf of the Texas Agricultural Finance Authority (Authority), adopts new §28.37 in Title 4, Part 1, Chapter 28, Subchapter C, of the Texas Administrative Code, concerning requirements for participation in the Authority's certified lender program, without changes to the proposed text as published in the December 24, 2010, issue of the *Texas Register* (35 TexReg 11451).

The new section is adopted to promote administrative efficiency with respect to certain financial commitments issued by the Authority under its Agricultural Loan Guarantee program. The new section provides eligibility and application requirements for the Authority's certified lender program.

No comments were received on the proposal.

The new section is adopted under §58.052(f) of the Agriculture Code, which requires the Authority by rule to establish a certified lender program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100388
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: February 17, 2011
Proposal publication date: December 24, 2010
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.3, §5.20

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter A, §5.3 and §5.20, regarding regulations related to Community Affairs Programs, without changes to the proposed text as published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10571) and will not be republished.

The amendments amend income eligibility standards for the Community Services Block Grant program.

Public comments were accepted through January 3, 2011. No comments were received regarding the proposed amendments.

The Board approved the final order adopting the amendment section on January 20, 2011.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100337
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 16, 2011
Proposal publication date: December 3, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.203, 5.207, 5.210, 5.216

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter B, Community Services Block Grant, §§5.203, 5.207, 5.210 and 5.216. Section 5.210 is adopted with changes to the text as published in the December 3, 2010, issue of the *Texas*

Register (35 TexReg 10574). Sections 5.203, 5.207 and 5.216 are adopted without change and will not be republished.

The amendments remove the actual formula for allocation of funds from the rules; establish a requirement that subrecipients submit the CSBG Performance Statement with the CAP plan, including submitting a board certification form that certifies a public hearing was held to solicit public comment on the proposed performance statement and budget; address the requirement to inform custodial parents of the services available to collect child support payments; add a new section that informs subrecipients of the required steps for a CSBG grievance procedure for addressing written complaints from applicants/clients; and add under "Board Responsibility," additional reports that board members are expected to be provided by their management and to review.

The Department received comments to the proposed amendments in writing by email. The Department's response to all comments received is included in this attachment. The comments and responses include both administrative clarifications and corrections to the amendments recommended by staff and substantive comments on the amendments and the corresponding Departmental responses. Comments and responses are presented in the order they appear in the rules.

REASONED RESPONSE TO PUBLIC COMMENT. Public comments were accepted through January 3, 2011. Comments were received from Ms. Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies. Staff reviewed the comments and provided reasoned responses.

§5.210(h). Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients.

COMMENT SUMMARY: §5.210(h)(1). Commenter recommended adding the word "business" after ten days.

STAFF RESPONSE: Staff concurs that affected staff at the respective agencies typically only work on business days and will add language suggested.

COMMENT SUMMARY: §5.210(h)(3). Commenter recommended changing the number of days within which to hold a hearing from ten business days to twenty business days.

STAFF RESPONSE: Staff concurs that while timeliness must be observed, we believe this is a reasonable amount of time and will revise the language suggested.

COMMENT SUMMARY: §5.210(h)(7). Commenter recommended changing the number of days to notify applicant of hearing decision from the following day after the hearing to the fifth business day after the hearing.

STAFF RESPONSE: Staff concurs that this still is within a reasonable amount of time and will revise the language suggested.

COMMENT SUMMARY: §5.210(h)(8). Commenter recommended adding the word "business" after ten days.

STAFF RESPONSE: Staff concurs that affected staff at the respective agencies typically only work on business days and will add language suggested.

COMMENT SUMMARY: §5.210(h)(12). Commenter recommended adding a new paragraph (12) as follows: If the denial is solely based on income eligibility, the applicant may request a re-certification of income eligibility based on initial documentation provided at the time of the original application. The re-certification will be an analysis of the initial calculation based on the documentation received with the initial application for services. If the re-certification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

STAFF RESPONSE: Staff concurs because it is unlikely that a denial based solely on income will benefit from an extended appeals process. However, staff would like to minimize the possibility of human error and the potential for abuse in limited cases and amends the proposed language as follows: If the denial is solely based on income eligibility, the previous provisions in §5.210(h)(2) - (11) do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

The Board approved the final order adopting the amendments on January 20, 2011.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG eligible entity due on October 31st.

(b) Every five (5) years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system in accordance with the National Performance Indicators and shall include a performance statement that describes the services, programs and activities to be administered by the organization.

(d) Hearing. A board certification that a public hearing was conducted on the proposed use of funds for the Community Action Plan must be submitted to the Department with the plan.

(e) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG subrecipients must complete an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter, for all households receiving a community action service. A new CSBG intake form or a centralized intake form must be completed on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(f) Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG subrecipients to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of

Title II, §676(b). An integrated case management system improves the overall provision of assistance and improves each subrecipient's ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have in operation a case management program that has the following components:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(3) As required by 42 U.S.C. §678G(b)(1-2), CSBG subrecipients shall inform custodial parents in single-parent families that participate in programs, activities, or services about the services available through the Texas Attorney General's Office with respect to the collection of child support payments and/or refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Non-CSBG eligible entities receiving state discretionary funds under §5.203(b) of this subchapter (relating to Distribution of CSBG Funds) are not required to submit a Community Action Plan. All CSBG subrecipients must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

(h) Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients. Subrecipients shall establish a CSBG grievance procedure to address written complaints from program applicants/clients. At a minimum, the following procedures shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) business days of the adverse determination. This notification shall include written instructions of the appeals process and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to subrecipient within ten (10) business days of receipt of the denial notice;

(2) The subrecipient who receives an appeal or client complaint shall establish a hearing committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files;

(3) The subrecipient shall hold the hearing within twenty (20) business days after the subrecipient received the appeal/complaint request from the applicant/client;

(4) The subrecipient shall record the hearing;

(5) The hearing shall allow time for a statement by subrecipient staff with knowledge of the case;

(6) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision;

(7) Subrecipient shall notify applicant/client of the decision in writing. The subrecipient shall mail the notification by close of business on the fifth business day following the decision (5-day turnaround);

(8) If the applicant/client is not satisfied, they may further appeal the decision in writing to the Department within ten (10) business days of notification of an adverse decision;

(9) The Department may review the recording of the hearing, the committee's decision, and any other relevant information necessary;

(10) Pursuant to §1.7 of this title (relating to Staff Appeals Process), Department staff shall review the case and forward the recommendation to the Division Director for final concurrence; and

(11) The Department will notify all parties in writing of its decision within thirty (30) days of receipt of the appeal.

(12) If the denial is solely based on income eligibility, the previous provisions in paragraphs (2) - (11) of this subsection, do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100338
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 16, 2011
Proposal publication date: December 3, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER C. EMERGENCY SHELTER GRANTS PROGRAM (ESGP)

10 TAC §§5.303, 5.304, 5.310

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter C, Emergency Shelter Grants Program, §§5.303, 5.304, and 5.310, without changes to the text as published in the December 3, 2010, issue of the *Texas Register* (35 TexReg 10577) and will not be republished.

The amendments include a method to redistribute and/or reallocate unexpended ESGP funds, the requirement for subrecipients to establish procedures and processes to ensure ESGP funds are expended for eligible clients, guidance on Essential

Services, and information on required elements of a grievance process.

Public comments were accepted through January 3, 2011. No comments were received regarding the proposed amendments.

The Board approved the final order adopting the amendments on January 20, 2011.

The amendments are adopted pursuant to the authority of the Texas Government Code Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100339
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 16, 2011
Proposal publication date: December 3, 2010
For further information, please call: (512) 475-3916

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CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §§60.101 - 60.127

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 60, Subchapter A, §§60.101 - 60.127, concerning Compliance Monitoring, without changes to the proposal as published in the November 26, 2010, issue of the *Texas Register* (35 TexReg 10378) and will not be republished.

The repeal of the sections allows for new sections to ensure compliance with all statutory requirements, incorporates public comment, improves the quality, simplifies the rules, and provides in-depth technical assistance on compliance issues.

The public comment period was from November 26, 2010 through December 27, 2010, during which written comments were accepted by mail, email and fax by the Department. The Department received no comments concerning the proposed repeal during the public comment period.

The Board approved the final order adopting this repeal on January 20, 2011.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 25, 2011.

TRD-201100308
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 14, 2011
Proposal publication date: November 26, 2010
For further information, please call: (512) 475-3916

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10 TAC §§60.101 - 60.129

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 60, Subchapter A, §§60.101 - 60.129, concerning Compliance Monitoring. Sections 60.101 - 60.103, 60.105 - 60.114, 60.116 - 60.118, 60.120 - 60.125, 60.128, and 60.129 are adopted with changes to the proposed text as published in the November 26, 2010, issue of the *Texas Register* (35 TexReg 10379). Sections 60.104, 60.115, 60.119, 60.126, and 60.127 are adopted without changes and will not be republished.

The new sections ensure compliance with all statutory requirements, incorporate public comment, improve the quality, simplify the rules, and provide in-depth technical assistance on compliance issues.

The Department accepted comments on the proposed sections by mail, email and fax, from November 26, 2010 through December 27, 2010. Comments were received from (1) AECC, Inc. and (2) Locke, Lord, Bissell and Liddell, LLP.

Public comments and the Division's response are presented in the order in which the sections appeared in the proposal.

REASONED RESPONSE TO PUBLIC COMMENT ON THE PROPOSED ADOPTION OF 10 TAC CHAPTER 60, SUBCHAPTER A, COMPLIANCE MONITORING.

General Comments. (2)

COMMENTS: Clean-up language was suggested to make some of the issues more clear and consistent.

STAFF RESPONSE: Staff agreed with the recommendations and incorporated the clean-up language as applicable.

§60.102(11)(A)(iii). Commencement of Substantial Construction.

COMMENT (1): Commenter suggested that the required completion of the foundation of the clubhouse be removed as a threshold requirement of substantial construction and be replaced with the requirement of 50 percent completion of all onsite "wet" utilities (water, sanitary sewer, and storm sewer plus natural gas if applicable) plus building slab/foundation formwork started.

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

§60.102(11)(A)(vi). Commencement of Substantial Construction.

COMMENT (1): Commenter suggested the language requiring all necessary utilities available at the property be removed because the owner does not have control over the utility provider's installation schedule. Commenter also suggested the utility

availability should be addressed in the partnership agreement phase.

STAFF RESPONSE: Staff agreed with the commenter and removed the language from the section.

§60.102(11)(A)(viii). Commencement of Substantial Construction.

COMMENT (1): Commenter suggested that "Architect of Record" replace "inspecting architect."

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

§60.102(11)(B)(ii). Commencement of Substantial Construction.

COMMENT (1): Commenter suggested that certification that there are no reasonable, foreseeable issues or circumstance which may prevent or delay the start and progress of construction, or timely successful completion of rehabilitation, be removed as a threshold requirement of substantial construction and replaced with a certification that the Developer will certify that all project documents, material and work items necessary to start and complete the project in the allotted time period have been adequately addressed as of the date of the certification.

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

§60.102(11)(B)(iii). Commencement of Substantial Construction.

COMMENT (1): Commenter suggested that at least 20 percent of the construction budget expended as documented by the Architect of Record be removed as a threshold requirement of substantial construction and be replaced with the requirement that 20 percent of the work on the units or buildings has been completed.

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

§60.103(f). Construction Monitoring.

COMMENT (1): Commenter suggested that the following language be added to this section: a certification from the Engineer of Record (if applicable) that the property was built in compliance with the design requirements.

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

§60.103(f) and (g). Construction Monitoring.

COMMENT (2): Commenter suggested that "final construction" replace "construction completion."

STAFF RESPONSE: Staff agreed and amended the language to the section as suggested.

The Board Approved the Final Order adopting the new sections, as well as administrative changes as needed for consistency within this chapter on January 20, 2011.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by the new sections.

§60.101. Purpose and Overview.

(a) This chapter satisfies the requirement of §42(m)(1)(B)(iii) Internal Revenue Code (Code) to provide a procedure that will be followed for monitoring for noncompliance with the provisions of the Code and to notify the Internal Revenue Service ("IRS") of such noncompliance. This chapter is consistent with requirements established under applicable state and federal laws, rules, and regulations, and the Department will monitor in accordance with this chapter. Nothing in this chapter serves to waive, alter, or amend the requirements of any duly recorded Land Use Restriction Agreement ("LURA"). A party to a LURA wishing to have the LURA amended must submit a formal request to the Department, and the Department will review any such request to determine if it is acceptable and, if acceptable, specify any appropriate requirements for or conditions or limitations on any such amendment. The Department monitors rental Developments receiving assistance under:

(1) the Housing Tax Credit program ("HTC");

(2) the HOME Investment Partnerships program ("HOME");

(3) the Tax Exempt Bond program ("BOND");

(4) the Housing Trust Fund program ("HTF");

(5) the Community Development Block Grant Disaster Recovery program ("CDBG");

(6) the Tax Credit Assistance Program ("TCAP");

(7) the Tax Credit Exchange Program ("Exchange"); and

(8) the Neighborhood Stabilization Program ("NSP").

(b) All Developments monitored by the Department are subject to the Department's enforcement rules, found in Subchapter C of this chapter (relating to Administrative Penalties).

(c) Compliance monitoring begins with the commencement of construction and continues to the end of the long term Affordability Period. The Compliance and Asset Oversight ("CAO") Division monitors to ensure Owners comply with the program rules and regulations, Chapter 2306, Texas Government Code, the LURA requirements and conditions, and representations imposed by the Application or award of funds by the Department. This chapter does not address forms and other records that may be required of Development Owners by the IRS or other governmental entities, whether for purposes of filing annual returns or supporting Development Owner tax positions during an IRS or other governmental audit.

§60.102. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms not defined herein are defined in §1.1 of this title (relating to Definitions for Housing Program Activities).

(1) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement ("LURA") or federal regulation, or commences on the first day of the Compliance Period as defined by §42(i)(1) in the United States Internal Revenue Code of 1986 and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction and may be terminated upon foreclosure. The Department reserves the right to extend the Affordability Period for HOME Developments that fail to meet program requirements. During the Affordability Period the Department shall monitor to ensure compliance with programmatic rules, regulations, and Application representations.

(2) Architect of Record--The architect licensed in the jurisdiction that the project is located in, who prepares, stamps and signs the construction documents, and is legally recorded as the architect for the project.

(3) Continuously Occupied--The same household has resided in the Unit for at least twelve (12) months.

(4) Extended Use Period--With respect to a HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) the date specified in the Land Use Restriction Agreement; or

(B) the date which is fifteen (15) years after the close of the Compliance Period.

(5) Housing Quality Standards ("HQS")--The property condition standards described in 24 CFR §982.401 in the Code of Federal Regulations.

(6) HTC Development--Sometimes referred to as "HTC Property." A Development using Housing Tax Credits allocated by the Department.

(7) U.S. Department of Housing and Urban Development ("HUD")-regulated Building--The rents and utility allowances of the building are reviewed by HUD on an annual basis.

(8) Material Noncompliance.

(A) A HTC or Exchange Development located within the state of Texas will be classified by the Department as being in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds a threshold of 30 points in accordance with the Material Noncompliance provisions, methodology, and point system in §60.123(l) and (m) of this chapter (relating to Material Noncompliance Methodology).

(B) Non-HTC Developments monitored by the Department with 1 - 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non-HTC Developments monitored by the Department with 51 - 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 50 points. Non-HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 80 points.

(C) For all programs, a Development will be in Material Noncompliance if the noncompliance is stated in §60.123 of this chapter to be Material Noncompliance.

(9) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(10) Owner--An individual, joint venture, partnership, limited partnership, trust, firm, corporation, limited liability company, other form of business organization or cooperative that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing Development, subject to the regulatory powers of the Department and other terms and conditions.

(11) Commencement of Substantial Construction--

(A) The minimum activity necessary to meet the requirements of Commencement of Substantial Construction for new construction Developments will be defined as:

(i) delivery of an executed partnership agreement with the investor or other documents setting for the legal structure and ownership;

(ii) delivery of the executed construction loan and construction loan agreement;

(iii) fifty percent completion of all onsite "wet" utilities (water, sanitary sewer, and storm sewer plus natural gas (if applicable) and building slab and foundation formwork started);

(iv) having all infrastructure permits;

(v) all grading completed (not including landscaping);

(vi) all Right of Way access; and

(vii) ten percent of the construction contract amount for the Development expended, adjusted for any change orders and certified by the Architect of Record.

(B) The minimum activity necessary to meet the requirement of Commencement of Substantial Construction for rehabilitation Developments will be defined as having:

(i) building permits issued or a clearance from the City stating that building permits are not required;

(ii) certification that all project documents, material and work items necessary to start and complete the project in the allotted time period have been adequately addressed as of the date of the certification; and

(iii) certification that work is progressing on at least 20 percent of the units or buildings.

(12) Unit Type--Units will be considered different Unit Types if there is any variation in the number of bedroom, bathrooms or a square footage difference equal to or more than one-hundred twenty (120) square feet. *Example 102(1):* A two bedroom/one bath Unit is considered a different Unit Type than a two bedroom/two bath Unit. A three bedroom/two bath Unit with 1,000 square feet is considered a different Unit Type than a three bedroom/two bath Unit with 1,200 square feet. A one bedroom/one bath Unit with 700 square feet will be considered equivalent to a one bedroom/one bath Unit with 800 square feet.

(13) UPCS--Uniform Physical Condition Standards as developed by the Real Estate Assessment Center of HUD.

§60.103. Construction Monitoring.

(a) The Department will monitor the entire construction phase for all applicable requirements according to the level of risk. After Final Construction during the Affordability Period, the Department will periodically monitor the Development to assure that the initial compliance review was correct.

(b) The Department will not provide any funding to any Development unless the Owner certifies that the housing Development is, or will be upon completion of construction, in compliance with the following housing laws:

(1) state and federal fair housing laws, including Chapter 301, Property Code, the Texas Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601, et seq.), and the Fair Housing Amendments of 1988 (42 U.S.C. §§3601, et seq.);

(2) the Civil Rights Act of 1964 (42 U.S.C. §§2000a, et seq.);

(3) the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101, et seq.); and

(4) Section 504, Rehabilitation Act of 1973 (29 U.S.C. §§701, et seq.). (§2306.257)

(c) Evidence of Commencement of Substantial Construction must be submitted no later than the deadline established in the Development's Commitment Notice. Four percent BOND Developments are not required to submit evidence of Commencement of Substantial Construction.

(d) Copies of any construction reports supplied to a syndicator must be supplied to the Department upon request.

(e) Copies of any reports issued during construction that indicate changes that affect the representations made during the Application process must be supplied to the Department upon request.

(f) Owners are required to submit evidence of final construction within thirty (30) days of completion in a format prescribed by the Department. In addition, the Architect of Record must submit a certification that the Development was built in compliance with all applicable laws and the Engineer of Record (if applicable) must submit a certification that the Development was built in compliance with the design requirements.

(g) The Department will conduct a final inspection after receipt of notification of final construction. During the inspection, the Department will confirm that committed amenities have been provided and will inspect for compliance with the applicable laws referenced in subsection (b) of this section. In addition, a UPCS inspection may be completed.

(h) Owners will be provided a written notice after the final inspection. If any deficiencies are noted, a ninety (90) day corrective action period will be provided.

(i) Forms 8609 and final retainage will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

(j) During any construction inspection, if the Owner and the Department are unable to agree that an identified issue is a violation, the Owner must request Alternative Dispute Resolution ("ADR"). The process for engaging ADR is outlined in §60.125 of this chapter.

§60.105. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through the Department's web-based Compliance Monitoring and Tracking System ("CMTS") and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed no later than September 1st of the year following the award. The Department will provide general instruction regarding the electronic transfer of data. Under special circumstances, the Department may, at its discretion, waive the online reporting requirements where a hardship can be demonstrated. In the absence of a written waiver, all Developments are required to submit reports online.

(b) Each Development is required to submit an Annual Owner's Compliance Report ("AOCR"). Depending on the Development, some or all of the Report must be submitted. The first AOCR is due the second year following the award. For example, if a Development is awarded funds in calendar year 2007, the first report is due in 2009. The AOCR is comprised of four sections:

(1) Part A "Owner's Certification of Program Compliance." All Development Owners must annually certify to compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules. In addition, Owners are required to report on the race and ethnicity, family composition, age, income, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance. HTC Developments during the Compliance Period will also be required to provide the name and mailing address of the syndicator in the Annual Owner's Compliance Report;

(2) Part B "Unit Status Report." All Developments must annually report the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations;

(3) Part C "Housing for Persons with Disabilities." The Department must establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The questions on Part C satisfy this requirement; and

(4) Part D "Owner's Financial Certification." Developments funded by the Department must annually provide the data requested in the Owner's Financial Certification.

(c) Parts A, B and C of the Annual Owner's Compliance Report must be provided to the Department no later than March 1st of each year, reporting data current as of December 31st of the previous year (the reporting year). Part D, "Owner's Financial Certification," which includes the current audited financial statements and income and expenses of the Development for the prior year, must be submitted to the Department no later than the last day of April each year.

(d) Any Development for which the AOCR, Part A, "Owner's Certification of Program Compliance," is not received or is received past the due date will be considered not in compliance with this section. If Part A is incomplete, improperly completed, or is not submitted by the Development Owner, it will be considered not received and not in compliance with this section. The Department will report to the IRS on Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition, any HTC Development that fails to comply with this requirement.

(e) Department staff will review Part A of the AOCR for compliance with the requirements of the appropriate program. If it appears that the Development is not in compliance based upon the report, the Owner will be given written notice and provided a corrective action period to clarify or correct the report. If the Owner does not respond to the notice, the report will be subject to the sanctions listed in subsections (f) and (g) of this section.

(f) If any required section, or sections (Parts A, B, C or D), of the report are not received on or before the deadline for submission specified in subsection (c) of this section, a notice of noncompliance will be sent to the Owner, specifying a corrective action deadline. If the report is not received on or before the corrective action deadline, the Department shall:

(1) For all HTC Developments, issue Form 8823 notifying the IRS of the violation; and

(2) For all Developments, score the noncompliance in accordance with §60.123 of this chapter (relating to Material Noncompliance Methodology).

(g) The Department may assess and enforce the following sanctions against an Owner who fails to submit the AOCR on or before March 1st of each year and has multiple, consistent, and/or repeated violations of failure to submit the AOCR by March 1st of each year:

(1) a late processing fee in the amount of $1,000; and/or

(2) a HTC Development that fails to submit the required AOCR for three (3) consecutive years may be reported to the IRS as no longer in compliance and never expected to comply.

(h) Periodic Unit Status Reports. All Developments must submit a Quarterly Unit Status report to the Department through the CMTS. Quarterly reports are due in January, April, July, and October on the 10th day of the month. The report must show occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th. The first quarterly report is due January 10th.

(i) Owners are encouraged to continuously maintain current resident data in the Department's CMTS. Under certain circumstances, such as in the event of a natural disaster, the Department may require all Developments to provide current occupancy data through CMTS.

(j) All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.

(k) Exchange developments must submit form 8609 with lines 7, 8(b), 9(b), 10(a), 10(c) and 10(d) thirty (30) days after the Department issues the executed form(s).

§60.106. Record Keeping Requirements.

(a) Development Owners must comply with program record-keeping requirements. Records must include sufficient information to comply with the reporting requirements of §60.105 of this chapter (relating to Reporting Requirements) and any additional programmatic requirements. HTC Development Owners must retain records sufficient to comply with the reporting requirements of Treasury Regulation 1.42-5(b)(1). Records must be kept for each qualified Low Income Unit and building in the Development, commencing with lease up activities and continuing on a monthly basis until the end of the Affordability Period.

(b) Each Development that is administered by the Department must retain records as required by the specific funding program rules and regulations. In general, retention schedules include but are not limited to the provision of subsections (c) - (f) of this section.

(c) HTC records must be retained for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building (§1.42-5(b)(2) of the Code).

(d) Retention of records for HOME rental Developments and the CDBG Disaster Recovery program must comply with the provisions of 24 CFR §92.508(c), which generally requires retention of rental housing records for five years after the Affordability Period terminates.

(e) Housing Trust Fund (HTF) rental Developments must retain tenant files for at least three years beyond the date the tenant moves from the Development. Records pertinent to the funding of the award, including but not limited to the Application and Development costs and documentation, must be retained for at least five (5) years after the Affordability Period terminates.

(f) Other rental Developments funded or administered in whole or in part by the Department must comply with record retention requirements as required by rule or deed restriction.

§60.107. Notices to the Department.

(a) If any of the events in paragraphs (1) - (3) of this subsection occur, written notice must be provided to the Department within the timeframes as shown in paragraphs (1) - (3) of this subsection:

(1) Any sale, transfer, or exchange of the Development or any portion of the Development. Notification must be provided at least thirty (30) days prior to this event;

(2) The Development suffers in whole or in part a casualty loss. Notification must be provided within thirty (30) days following the event of loss using the Department's Notice of Casualty Loss (for general casualty losses) or Notice of Disaster Casualty Loss (specific to loss as a result of a Presidentially Declared Disaster); and

(3) Owners of Bond Developments shall notify the Department of the date 10 percent of the Units are occupied and the date 50 percent of the Units are occupied within ninety (90) days of such dates.

(b) Owners are responsible for maintaining current information (including contact persons, physical addresses, mailing addresses, email addresses, and phone numbers) for the Ownership entity and management company in the Department's Compliance Monitoring and Tracking System ("CMTS"). Treasury Regulations require the Department to notify Housing Tax Credit Owners of upcoming reviews and instances of noncompliance. The Department will rely on the information supplied by the Owner in CMTS to meet this requirement.

§60.108. Determination, Documentation and Certification of Annual Income.

(a) For all rental programs administered by the Department, annual income shall be determined consistent with the Section 8 Program, using the definitions of annual income described in HUD Handbook 4350.3 as amended from time to time. At the time of program designation as a low income household, Owners must certify and document household income. In general, all low income households must be certified prior to move in.

(b) The Department permits Owners to use check stubs or other firsthand documentation of income and assets provided by the applicant or household in lieu of third party verification forms. It is not necessary to first attempt to obtain a third party verification form as required by the HUD 4350.3.

(c) The Department requires the use of the TDHCA Income Certification form, unless the property also participates in the Rural Development or a project Based HUD program, in which case, the other program's income certification form will be accepted.

§60.109. Utility Allowances.

(a) The Department will monitor to determine if HTC, HOME, BOND, HTF, CDBG, NSP, TCAP, and Exchange properties comply with published rent limits which include an allowance for tenant paid utilities. For HTC, TCAP and Exchange buildings, if the residents pay utilities directly to the Owner of the building or to a third party billing company, and the amount of the bill is based on an allocation method or "ratio utility billing system" (RUBS), this monthly amount will be considered a mandatory fee. For HTC, TCAP and Exchange buildings, if the residents pay utilities directly to the Owner of the building or to a third party billing company, and the amount of the bill is based on the tenant's actual consumption, Owner may account for the utility in an allowance. The rent, plus all mandatory fees, plus an allowance for those utilities paid by the resident directly to a utility provider, must be less than the allowable limit. For HOME, BOND, HTF, NSP, and CDBG buildings, Owners may account for utilities paid directly to the Owner or to a third party billing company in their utility allowance. Where residents are responsible for some, or all, of the utilities--other than telephone, cable, and internet--Development Owners must use a utility allowance that complies with both this section and the applicable program regulations. An Owner may not change utility allowance methods without written approval from the Department. Any such request must include the Utility Allowance Questionnaire found on the Department's website.

(b) Rural Housing Services ("RHS") buildings or buildings with RHS assisted tenants. The applicable utility allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted tenants.

(c) HUD-Regulated buildings layered with any Department program. If neither the building nor any tenant in the building receives RHS rental assistance payments, and the rents and the utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent restricted Units in the building is the applicable HUD utility allowance. No other utility method described in this section can be used by HUD-regulated buildings.

(d) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the following methods:

(1) The utility allowance established by the applicable Public Housing Authority ("PHA") for the Section 8 Existing Housing Program. The Department will utilize Texas Local Government Code Chapter 392 to determine which PHA is the most applicable to the Development. If the PHA publishes different schedules based on building type, the Owner is responsible for implementing the correct schedule based on the Development's building type(s). *Example 109(1):* The applicable PHA publishes a separate utility allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consist of twenty buildings, ten of which are Apartments (5+ units) and the other ten buildings are Duplexes. The Owner must use the correct schedule for each building type. In the event the PHA publishes a utility allowance schedule specifically for energy efficient units, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency on an ongoing basis. If the property is located in an area that does not have a municipal, county or regional housing authority that publishes a utility allowance schedule for the Section 8 Existing Housing Program, Owners must select an alternative methodology. If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility. If an Owner chooses to implement a methodology as described in paragraph (2), (3), (4), or (5) of this subsection, for Units occupied by Section 8 voucher holders, the utility allowance remains the applicable PHA utility allowance established by the PHA from which the household's voucher is received.

(2) A written estimate from a local utility provider. If there are multiple utility companies that service the Development, the local provider must be a residential utility company that offers service to the residents of the Development requesting the methodology. The Department will use the Texas Electric Choice website: http://www.powertochoose.org/ to verify the availability of service. If the utility company is not listed as a provider in the Development's ZIP code, the request will be denied. Additionally, the estimate must be signed by the utility provider representative and specifically include all "component charges" for providing the utility service. Receipt of the information from the utility provider begins the ninety (90) day period after which the new utility allowance must be used to compute gross rent.

(3) The HUD Utility Model Schedule. A utility estimate can be calculated by using the "HUD Utility Model Schedule" that can be found at http://www.huduser.org/portal/resources/utilmodel.html (or successor Uniform Resource Locator). The rates used must be no older than the rates in effect sixty (60) days prior to the beginning of the ninety (90) day period in which the Owner intends to implement the allowance. For Owners calculating a utility allowance under this methodology, the model, along with all back-up documentation used in the model, must be submitted to the Department, on a CD, within the timeline described in subsection (f) of this section. The date entered as the "Form Date" on the "Location" tab of the spreadsheet will be the date used to begin the ninety (90) day period after which the new utility allowance must be used to compute gross rent.

(4) An energy consumption model. The utility consumption estimate must be calculated by a properly licensed mechanical engineer or an individual holding a valid Residential Energy Service Network ("RESNET") or Certified Energy Manager ("CEM") certification. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of building location. The ninety (90) day period after which the new utility allowance must be used to compute gross rent will begin sixty (60) days after the end on the last month of the twelve (12) month period for which data was used to compute the estimate.

(5) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and rates, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method."

(e) For a Development Owner to use the Actual Use Method they must:

(1) provide a minimum sample size of usage data for at least five (5) Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type whichever is greater. *Example 109(2):* A Development has twenty three bedroom/one bath Units, and eighty (80) three bedroom/two bath Units. Each bedroom/bathroom equivalent Unit is within 120 square feet of the same floor area. Data must be supplied for at least five of the three bedroom/one bath Units, and sixteen of the three bedroom/two bath Units. If there are less than five Units of any Unit Type, data for 100 percent of the Unit Type must be provided;

(2) scan the information in subparagraphs (A) - (E) of this paragraph onto a CD and submit it to the Department no later than the beginning of the ninety (90) day period in which the Owner intends to implement the allowance, reflecting data no older than sixty (60) days prior to the ninety (90) day implementation period. *Example 109(3):* The utility provider releases the information regarding electric usage at Westover Townhomes on February 5, 2010. The data provided is from February 1, 2009 through January 31, 2010. The Owner must submit the information to the Department no later than March 31, 2010 for the information to be valid;

(A) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the actual kilowatt usage for each Unit for which data was obtained, and the rates in place at the time of the submission;

(B) A copy of the request to the utility provider (or billing entity for the utility provider) to provide usage data;

(C) All documentation obtained from the utility provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(D) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider;

(E) Documentation of the current utility allowance used by the Development;

(3) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the utility allowance for each bedroom size using the following guidelines:

(A) If data is obtained for more than 20 percent or five (5) of each Unit Type, all data will be used to calculate the allowance;

(B) If more than twelve (12) months of data is provided for any Unit, only the data for the most current twelve (12) months will be averaged;

(C) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e. kilowatts over the last twelve (12) months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for eighteen (18) two bedroom/one bath Units, and twelve (12) two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(D) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance;

(E) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance;

(4) The Department will complete its evaluation and calculation within forty-five (45) days of receipt of all the information requested in paragraph (2) of this subsection.

(5) Receipt of approval from the Department will begin the ninety (90) day period after which the new utility allowance must be used to compute gross rent; and

(6) For newly constructed Developments or Developments that have Units which have not been continuously occupied, the Department, on a case by case basis, may use consumption data for Units of similar size and construction in the geographic area to calculate the utility allowance;

(f) Effective dates. If the Owner uses the methodologies as described in subsection (b), (c), or (d)(1) of this section, any changes to the allowance can be implemented immediately, but must be implemented for rent due ninety (90) days after the change. For methodologies as described in subsection (d)(2) - (5) of this section, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the ninety (90) day period in which the Owner intends to implement the utility allowance. With the exception of the methodology described in subsection (d)(5) of this section, if a response is not received from the Department within the ninety (90) day period, the Owner may temporarily use the submission as a safe harbor until the Department provides written authorization (the Owner cannot assume that the allowance is approved by the Department but can operate in good faith prior to notification). Failure to submit the proposed utility allowance to the Department and make it available to the residents will result in a finding of noncompliance.

(g) Requirements for Annual Review. Owners utilizing the methods described in subsections (b) and (c) of this section must demonstrate that the utility allowance has been reviewed annually. Any change in the method described in subsection (d)(1) of this section can be implemented immediately, but must be implemented for rent due ninety (90) days after the change. Owners utilizing the methods described in subsection (d)(2) - (5) of this section must submit to the Department, once a calendar year, copies of the utility estimate and simultaneously make the estimate available to the residents by posting the estimate in a common area of the leasing office at the Development. Changes in utility allowances cannot be implemented until the estimate has been submitted to the Department and made available to the residents by posting in the leasing office for a ninety (90) day period. The back-up documentation required by the methodology the Owner has chosen must be submitted to the Department for approval no later than October 1st; however, the Department encourages Owners to submit documentation prior to the October 1st deadline in order to ensure that the Department has adequate time to review and respond to the Owner's estimate.

(h) Combining Methodologies. With the exception of HUD regulated buildings and RHS buildings, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (electric, gas, etc.). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance.

(i) Increases in Utility Allowances for Developments with HOME funds. Unless otherwise instructed by HUD, the Department will permit owners to implement changes in utility allowance in the same manner as Housing Tax Credit ("HTC") Developments.

(j) The Owner shall maintain and make available for inspection by the tenant the data upon which the utility allowance schedule is calculated. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the tenant at the convenience of both the Owner and tenant.

§60.110. Lease Requirements (HTC and HOME Developments).

(a) For HTC Developments, Revenue Ruling 2004-82 prohibits the eviction or termination of tenancy of low income households for other than good cause throughout the entire Affordability Period, and for three (3) years after termination of an extended low-income housing commitment. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited.

(b) For HOME Developments, the HOME Final Rule prohibits Owners from evicting low income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal, state or local law, for completion of the tenancy period for transitional housing, or for other good cause. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action at least thirty (30) days before the termination of tenancy. Owners executing or renewing leases after November 1, 2007 shall specifically state in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253).

(c) The Department does not determine if an Owner has good cause or if a resident has violated the lease terms. If there is a challenge to a good cause eviction, that determination will be made by a court of competent jurisdiction or an agreement of the parties in arbitration. The Department will rely on the court decision or the agreement of the parties.

(d) HTC and BOND Developments must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, or seizing or threatening to seize the personal property of a resident, except by judicial process, for the purposes of performing necessary repairs or construction work, or in cases of emergency. These prohibitions must be included in the lease or lease addendum.

§60.111. Annual Recertification for All Programs and Student Requirements for HTC, Exchange, TCAP and BOND Developments.

(a) Recertification Requirements for 100 percent low income HTC, Exchange and TCAP Developments:

(1) Regardless of the requirements stated in a LURA, the Department will not monitor to determine if 100 percent low income HTC Developments perform annual income recertifications. Households will maintain the designation they had at initial certification;

(2) To comply with HUD reporting requirements, once every calendar year, the Development must collect a self certification from each household that reports the following: the number of household members, age, ethnicity, race, disability status, rental amounts and rental assistance (if any). In addition, the self certification will collect information about student status to establish ongoing compliance with the HTC program. The Development must collect this self certification information on the Department's Annual Eligibility Certification form (AEC) and must maintain the certification in all household files; and

(3) One-Hundred percent low income HTC Developments that continue to complete annual income recertifications are required to obtain the AEC form described above and maintained it in all household files. The Department will not review recertification documentation during a monitoring review unless noncompliance is identified with the initial certification. Failure to complete the AEC form will result in a noncompliance finding under, "Failure to maintain or provide Annual Eligibility Certification" and scored in the Department's Compliance Status System as applicable.

(b) Recertification Requirement for Mixed Income HTC, Exchange and TCAP Developments. HTC projects (as defined on Part II question, 8b of IRS form 8609) with Market Units must complete annual income recertifications. See §60.112 of this chapter (relating to Managing Additional Income and Rent Restrictions for HTC, Exchange and TCAP Developments) for maintaining compliance with the Available Unit Rule.

(c) Student Requirements for HTC, Exchange and TCAP Developments. Changes to student status reported by the household at anytime during their occupancy or on the AEC require the Owner to determine if the household continues to be eligible under the HTC program. During the Compliance Period, if the household is comprised of full-time students, the household must meet a HTC program exception, and supporting documentation must be maintained in the household's file. The Development must have a statement in a lease addendum (or in their lease contract) that requires households to report changes in their student status. During the Compliance Period, Noncompliance with this section will result in the issuance of IRS form 8823 reporting noncompliance under, "Low-income Units occupied by nonqualified full-time students" and scored in the Department's Compliance Status System as applicable. Regardless of the requirements stated in a LURA, after the Compliance Period, the Department will not monitor to determine if households meet the student requirements of the Housing Tax Credit program.

(d) Recertification Requirements for BOND Developments. Regardless of the requirements stated in a LURA the Department will not monitor to determine if 100 percent income restricted Bond Developments (all units required to be leased to low-income and eligible tenants) perform annual income recertifications. Households will maintain their designation they had at initial certification.

(e) Student Requirements for BOND Developments. Bond Developments must continue to annually screen households for student status. The Owner must use the Department's Certification of Student Eligibility form and it must be maintained in the household's file. Changes to student status that the household reports at anytime during their occupancy or during annual screening for student status, require the Owner to determine if the household continues to be eligible under the Bond program. If the household is comprised of full-time students then the household must meet a program exception, which must be documented and maintained in the household's file. If the household is not an eligible student household, it may be possible to re-designate the full-time student household to an Eligible Tenant (ET). The Development must have a statement in a lease addendum (or in their lease contract) that requires households to report changes in their student status. Noncompliance with this section will result in a noncompliance finding under, "Low-income Units occupied by nonqualified full-time students" and scored in the Department's Compliance Status System as applicable.

(f) Recertification Requirements for HOME Developments.

(1) For HOME Investment Partnership Developments, in accordance with 24 CFR §92.203 and §92.252 of the HOME Final Rule, regardless of the requirements stated in a LURA, recertification requirements will be monitored as shown in paragraph (2)(A) - (F) of this subsection.

(2) HOME Developments must complete a recertification with verifications of each HOME assisted Unit every sixth year of the Development's affordability period. For purposes of this section the beginning of a HOME Development affordability period is the effective date on the first page of the HOME LURA. For example, a HOME Development with a LURA effective date of May 2001 will have the sixth year of the affordability period determined in *Example 111(1):*

(A) Year 1: May 2001 - April 2002;

(B) Year 2: May 2002 - April 2003;

(C) Year 3: May 2003 - April 2004;

(D) Year 4: May 2004 - April 2005;

(E) Year 5: May 2005 - April 2006;

(F) Year 6: May 2006 - April 2007.

(3) In the scenario in paragraph (2) of this subsection, all households in HOME Units must be recertified with source documentation between May 2006 to April 2007, even if a household moved in to the Development in 2005. In the intervening years the Development must collect a self certification from each household that is assisted with HOME funds. The form must report the following: the number of household members, age, income and assets, ethnicity, race, disability status, rental amounts and rental assistance (if any). The Development must use the Department's Income Certification form to collect this information and it must be maintained in the household's file. Noncompliance with this section will result in a noncompliance finding of, "Owner failed to maintain or provide tenant annual income recertification" and scored in the Department's Compliance Status System as applicable. If the household reports on their self certification that their household income is above the current 80 percent applicable income limit or there is evidence that the household's written statement failed to completely and accurately provide information about the household's

characteristics and/or income, then a recertification with verifications is required.

(4) Fixed HOME Developments (defined as 100 percent of the Units in the Development are HOME assisted) that contain households with an annual income greater than the 80 percent applicable income limit at recertification must be designated as over income ("OI") and the rent charged must be 30 percent of the household's adjusted income. The Next Available Unit must be leased to a household with an income and rent less than either the Low or High HOME limit depending on what designation the Development needs to maintain compliance with the HOME LURA. Noncompliance with this section will result in a noncompliance finding of "Household income increased above 80 percent at recertification and owner failed to properly determine rent" and scored in the Department's Compliance Status System as applicable.

(5) Floating HOME Developments with Market Units (defined when only a percentage of the Units are HOME assisted) that contain households with income greater than 80 percent at recertification must be designated as OI and the rent charged will be the lesser of 30 percent of the household's adjusted income or comparable Market rent. The Next Available non-HOME Unit on the Development must be leased to a household with income and rent less than either the Low or High HOME limit depending on what designation the Development needs to maintain compliance with the HOME LURA. The OI household may be redesignated as Market once the OI Unit is replaced with another low-income Unit and in accordance with the lease terms. A thirty (30) day written notice of a rent increase must be provided to the OI household. Noncompliance with this section will result in a noncompliance finding of, "Household income increased above 80 percent at recertification and owner failed to properly determine rent" and scored in the Department's Compliance Status System as applicable.

(6) One-hundred percent low income HOME Developments layered with other Department affordable housing programs, that contain household's with income greater than 80 percent at recertification, must be designated as OI under the HOME program. The rent charged must be the lesser of 30 percent of the household's adjusted income or the gross rent allowable under the other program's rent limit. The Development must maintain compliance with all applicable program rent requirements. Noncompliance with this section will result in a noncompliance finding of, "Household income increased above 80 percent at recertification and owner failed to properly determine rent" and scored in the Department's Compliance Status System as applicable.

(g) Recertification Requirements for One-Hundred Percent HTF Developments: Regardless of the requirements stated in a LURA, the Department will not monitor to determine if 100 percent low income HTF Developments performed annual income recertifications. The household will maintain its initial low-income designation at move in and throughout the household's occupancy i.e., Extremely Low Income ("ELI"), Very Low Income ("VLI") and Low Income ("LI") provided that the Owner does not charge gross rent in excess of the applicable rent limit.

(h) Recertification Requirements for HTF Developments with Market units: HTF Developments with Market Units in one or more buildings (as evidenced in their LURA) must perform annual income recertifications of all households residing in HTF Program Units. The HTF program requires Developments to comply with the Available Unit Rule. If a household's income exceeds 140 percent of the recertification limit (highest income tier), the household must be redesignated as OI and the Next Available Unit on the Development must be leased to a household with an income and rent less than the EVI, VLI, and LI limit depending on what designation the Development needs to maintain compliance with the LURA. The OI household may be redesignated in accordance with lease terms as Market once the OI Unit is replaced with another low-income Unit.

(i) Recertification Requirements for CDBG and NSP Developments: CDBG or NSP Developments are not required to perform annual recertifications unless the CDBG and NSP LURAs specify this requirement.

§60.112. Managing Additional Income and Rent Restrictions for HTC, Exchange and TCAP Developments.

(a) Under the Code, HTC Development Owners elect a minimum set-aside requirement of 20/50 or 40/60 (20 percent of the Units restricted to the 50 percent income and rent limit, or 40 percent of the Units restricted at the 60 percent income and rent limits). The minimum set-aside elected sets the maximum income and rent limits for the low-income units on the Development. Many Developments have additional income and rent requirements (i.e. 30 percent, 40 percent and 50 percent) that are lower than the minimum set-aside requirement. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's Land Use Restriction Agreement ("LURA"). The Department will examine the actual gross rent and income levels of all households to determine if the additional income and rent requirements of the LURA are met.

(b) For 100 percent HTC Developments that are not required to perform annual recertification, regardless of the requirements stated in the Development's LURA, the additional rent and occupancy restrictions will be monitored as follows:

(1) Households initially certified at the 30 percent income and rent limits. Households will maintain their designation they had at initial move-in. The Unit will continue to meet the 30 percent set-aside requirement provided that the Owner does not charge gross rent in excess of the 30 percent rent limit. When the household vacates the Unit, the next available Unit on the Development is leased to a household with an income and rent less than the 30 percent limit;

(2) Households initially certified at the 40 percent income and rent limits. Households will maintain their designation they had at initial move in. The Unit will continue to meet the 40 percent set-aside requirement provided that the Owner does not charge gross rent in excess of the 40 percent rent limit. When the household vacates the Unit, the next available Unit on the Development is leased to a household with an income and rent less than the 40 percent limit; and

(3) Households initially certified at the 50 percent income and rent limits. Households will maintain their designation they had at initial move in. The Unit will continue to meet the 50 percent set-aside requirement provided that the Owner does not charge gross rent in excess of the 50 percent rent limit. When the household vacates the Unit, the next available Unit on the Development is leased to a household with an income and rent less than the 50 percent limit.

(c) Mixed Income HTC Developments with Market Units will be monitored as follows:

(1) The HTC program requires Mixed Income Developments with Market Units to comply with the Available Unit Rule. When a household's income at recertification exceeds 140 percent of the applicable current income limit elected by the minimum set-aside, the owner must comply with the Available Unit Rule and lease the next available unit (same size or smaller) in the building to a low-income household to maintain compliance. For HTC Developments that are required to perform annual recertifications, the additional rent and occupancy restrictions will be monitored as follows:

(A) Households initially certified at the 30, 40 or 50 percent income and rent limits;

(B) Households will maintain the designation they had at initial move in unless the household's income exceeds 140 percent of the highest income tier established by the minimum set-aside. The Unit will continue to meet the designation that had at initial certification provided that the Owner does not charge gross rent in excess of the additional rent and occupancy rent limit;

(C) The household will not be required to vacate the Unit for other than good cause. When the household vacates the Unit, the next available Unit on the Development must be leased so as to meet the Development's additional rent and occupancy restrictions;

(D) If the household's income exceeds 140 percent of the highest income tier established by the minimum set-aside the household must be redesignated as over income ("OI") and the Next Available Unit Rule must be followed. *Example 112(1):* A household was initially certified at the 40 percent income limit at move in. The household's income increases at recertification above the 40 percent income limit to the 50 percent income limit. The Unit will continue to meet the 40 percent set-aside requirement provided that the Owner does not charge rent in excess of the 40 percent rent limit. When the household vacates the Unit, the Next Available Unit on the Development is leased to a household with an income and rent less than the 40 percent limits; and

(2) This subsection does not require HTC Developments to lease more Units under the additional occupancy restrictions than established in their LURA.

§60.113. Household Unit Transfer Requirements for All Programs.

(a) Household Transfers for One-Hundred percent HTC, Exchange, and TCAP Developments. For HTC Developments that are 100 percent low-income, a household may transfer to any Unit within the same project, as defined as a multiple building project on Part II, question 8b of the IRS form 8609. If the Owner elected to treat each building as a separate project, as defined on Part II, question 8b of the 8609 form, households must be certified as low-income (determined by the Development's minimum set-aside election) prior to moving to another building on the Development.

(b) Household Transfers for Mixed Income HTC, Exchange and TCAP Developments. For HTC Developments that are Mixed Income with Market Units, a household may transfer to another building in the same project, as defined as a multiple building project on Part II of the IRS form 8609 if the household was not over income ("OI") at the time of the last annual income recertification. If the Owner elected to treat each building as a separate project, as defined on Part II of the IRS form 8609, households must be certified as low-income (determined by the Development's minimum set-aside election) prior to moving to another building on the Development.

(c) BOND, HTF, HOME, CDBG, and NSP for Household Transfers. For BOND, HTF, HOME, CDBG and NSP Developments that are 100 percent low-income, a household may transfer to any Unit within the Development. If the Development has Market Units in one or more buildings (as evidenced in their LURA), a household may transfer to any Unit within the Development as long as the household is income certified for the new Unit prior to transfer. The household must be redesignated under the current income limit for each program requirement(s). If the Development is layered with Housing Tax Credits, default to transfer guidelines under the HTC rules.

(d) Household Transfers in the Same Building for all Programs. A Household may transfer to a new Unit within the same building. The unit designations will swap status. *Example 113(1):* Building 1 has 4 low-income Units. Units 1 through 3 are occupied by low-income households and Unit 4 is a vacant low-income unit. The household in Unit 2 moves to Unit 4 and the Unit designations swap status. Unit 2 is now a vacant low-income unit.

§60.114. Requirements Pertaining to Households with Rental Assistance.

(a) The Department will monitor to ensure Development Owners comply with §2306.269 and §2306.6728, Texas Government Code, regarding residents receiving rental assistance under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437f).

(b) The policies, standards and sanctions established by this section apply only to:

(1) multifamily housing developments that receive the following assistance from the Department on or after January 1, 2002 (§2306.185 of the Texas Government Code);

(A) a loan or grant in an amount greater than 33 percent of the market value of the Development on the date the recipient took legal possession of the Development; or

(B) a loan guarantee for a loan in an amount greater than 33 percent of the market value of the Development on the date the recipient took legal title to the Development;

(2) multifamily rental housing Developments that applied for and were awarded housing tax credits after 1992;

(3) housing developments that benefit from the incentive program under §2306.805 of the Texas Government Code; and

(4) housing Developments that receive funding from the HOME program (24 CFR §92.252(d)).

(c) Owners of multifamily rental housing developments described in subsection (a) of this section are prohibited from:

(1) excluding an individual or family from admission to the Development because the individual or family participates in the HOME Tenant Based Rental Assistance Program or the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437f); and

(2) using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than 2.5 times the individual's or family's share of the total monthly rent payable to the Owner of the Development. A household participating in the voucher program or receiving any other type of rental assistance may not be required to have a minimum income exceeding $2,500 per year.

(d) To demonstrate compliance with this section, Owners shall:

(1) State in their leasing criteria that the Development will comply with state and federal fair housing and antidiscrimination laws;

(2) Apply screening criteria uniformly, (rental, credit, and/or criminal history), including employment policies, and in a manner consistent with the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules;

(3) Approve and distribute an Affirmative Marketing Plan that will be used to attract prospective applicants of all minority and non-minority groups in the housing market area regardless of their race, color, religion, sex, national origin, disability, familial status, or religious affiliation. Racial groups to be marketed to may include White, African American, Native American, Alaskan Native, Asian, Native Hawaiians or Other Pacific Islanders. Other groups in the housing market area who may be subject to housing discrimination include, but are not limited to, Hispanic or Latino groups, persons with disabilities, families with children, or persons with different religious affiliations.

The Affirmative Marketing Plan must be provided to the property management and onsite staff. Owners are encouraged to use HUD Form 935.2A, and may use any version of this Form as applicable. The Affirmative Marketing Plan must identify the following:

(A) Which group(s) the Owner believes are least likely to apply for housing at the Development without special outreach. All Developments must select persons with disabilities as one of the groups identified as least likely to apply. When identifying racial/ethnic minority groups the Development will market to, factors such as the characteristics of the housing's market area should be considered. *Example 114(1):* An Owner obtains census data showing that 6.5 percent of the city's total population are identified as Asian Americans. However, the Owner's demographic data for the Development shows that zero Asian American households are represented. The Owner chooses to identify Asian American groups as one of the groups least likely to apply at the Development without special outreach;

(B) Procedures that will be used by the Owner to inform and solicit applications from persons who are least likely to apply. Specific media and community contacts that reach those groups designated as least likely to apply must be identified (community outreach contacts may include neighborhood, minority, or women's organizations, grass roots faith-based or community-based organizations, labor unions, employers, public and private agencies, disability advocates, or other groups or individuals well known in the community that connect with the identified group(s). *Example 114(2):* An Owner has identified the disabled as least likely to apply and has decided to send letters on a quarterly basis to the Case Manager at a non-profit organization coordinating housing for developmentally disabled adults. Additionally, the Owner will advertise upcoming vacancies in a monthly newsletter circulated by an organization serving the hearing impaired;

(C) How the Owner will assess the success of Affirmative Marketing efforts. Affirmative Marketing Plans should be reviewed on an annual basis to determine if changes should be made and plans must be updated every five (5) years to fully capture demographic changes in the housing's market area;

(D) Records of marketing efforts must be maintained for review by the Department during onsite monitoring visits. *Example 114(3):* The Owner keeps copies of all quarterly correspondence mailed to the contacts or community groups identified in the Affirmative Marketing Plan. The letters are dated and addressed and show that the Owner is actively marketing vacancies, or a waiting list to the groups identified in the Owner's plan. Failure to maintain a reasonable Affirmative Marketing Plan and documentation of marketing efforts on an annual basis will result in a finding of noncompliance;

(E) If a Development does not have any vacant units, Affirmative Marketing is still required and Owners must maintain a waiting list. If a Development does not have any vacancies and the waiting list is closed, Affirmative Marketing is not required; and

(F) In accordance with 24 CFR §92.253(d) of the HOME Final Rule, Owners of HOME Developments must maintain a written waiting list and tenant selection criteria. Failure to maintain these documents will result in a finding of noncompliance.

§60.116. Monitoring for Social Services.

(a) If a Development's LURA requires the provision of social services, the Department will confirm this requirement is being met. Owners are required to maintain sufficient documentation to evidence that services are actually being provided. Documentation will be reviewed during onsite visits and must be submitted to the Department upon request. *Example 116(1):* The Owner's LURA requires provision of on-site daycare services. The Owner maintains daily sign in sheets to demonstrate attendance and keeps a roster of the households that are regularly participating in the program. The Owner also keeps copies of all newsletters and fliers mailed out to the Development tenants that reference daycare services.

(b) Supportive services must be fully implemented prior to the issuance of IRS forms 8609 for the HTC program. If an Owner wishes to change the scope of services provided, prior approval from the Department is necessary. The Department, upon review of the Owner's request and the Development's original application, may also require the Owner to submit a proposed amendment to the LURA. It is not necessary to obtain prior written approval to change the provider of services unless the scope of services is being changed. Failure to comply with the requirements of this section shall result in a finding of noncompliance.

§60.117. Monitoring for Non-Profit Participation or HUB Participation.

(a) If a Development's LURA requires the material participation of a non-profit or Historically Underutilized Business ("HUB"), the Department will confirm this requirement is being met throughout the development phase and ongoing operations of the Development. Owners are required to maintain sufficient documentation to evidence that a non-profit or HUB is materially participating. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If an Owner wishes to change the non-profit, or HUB, prior approval from the Department is necessary. The Annual Owner's Compliance Report also requires Owners to certify to compliance with this requirement. Failure to comply with the requirements of this section shall result in a finding of noncompliance. In addition, the Internal Revenue Service will be notified if the non-profit is not materially participating on a HTC Development during the Compliance Period.

(c) The Department does not enforce partnership agreements or determine equitable fund distributions of partnerships. These disputes are matters for a court of competent jurisdiction.

§60.118. Property Condition Standards.

(a) All Developments funded by the Department must be decent, safe, sanitary, in good repair, and suitable for occupancy throughout the Affordability Period. The Department will use HUD's Uniform Physical Condition Standards ("UPCS") to determine compliance with property condition standards. In addition, Developments must comply with all local health, safety, and building codes. The Department may contract with a third party to complete UPCS inspections.

(b) HTC Development Owners are required by Treasury Regulation 1.42-5 to report (through the Annual Owner's Compliance Report) any local health, safety, or building code violations. HTC Developments that fail to comply with local codes shall be reported to the IRS.

(c) The Department will evaluate UPCS reports in the following manner:

(1) A finding of Major Violations will be cited if:

(A) Life threatening health, safety, or fire safety hazards are reported on the Notification of Exigent and Fire Safety Hazards Observed form and are not corrected within twenty-four (24) hours of the inspection with notification of correction submitted to the Department within seventy-two (72) hours of the inspection. Failure to notify the Department of correction within seventy-two (72) hours of the correction of any exigent health and safety or fire safety hazards listed on the Notification will result in a finding of Major Violations of the Uniform Physical Condition Standards for the Development; or

(B) An overall UPCS score of less than 70 percent (69 percent or below) is reported.

(2) A finding of Pattern of Minor Violations will be assessed if an overall score between 70 percent and 89 percent is reported; or

(3) Findings of both Major and Minor Violations will be assessed if deficiencies reported meet the criteria for both.

(d) The Department is required to report any HTC Development that fails to comply with any requirements of the UPCS or local codes at any time (including smoke detectors and blocked egresses) to the IRS on Form 8823. Accordingly, the Department will submit Form 8823 for any UPCS violation. However, if the violation(s) does not meet the conditions described in subsection (c)(1) or (2) of this section, the issue will be noted in the Department's compliance status system as Administrative Reporting and no points will be assigned in the Department's compliance status evaluation of the Development. Non-HTC Developments that do not meet thresholds for Major and Pattern of Minor Violations as described in subsection (c)(1) or (2) of this section and correct all life threatening health, safety, and fire safety hazards noted at the time of inspection as directed in subsection (c)(1)(A) of this section will not receive findings for UPCS inspections. Items noted that do not exceed thresholds for Major and Pattern of Minor Violations must be corrected by submission of an Owner's Certification of Repair within the ninety (90) day corrective action period.

(e) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that will allow the Department to reasonably determine when the repair was made and whether the repair sufficiently corrected the violation(s) of UPCS standards (examples of such documentation include work orders, photographs, and/or invoices to third party repair specialists).

(f) The Department will provide to the Owner in writing a ninety (90) day corrective action period to respond to a notice of noncompliance for violations of the UPCS. The Department will grant up to an additional ninety (90) day extension if there is good cause and the Owner clearly requests an extension during the corrective action period.

(g) 24 CFR §92.251 of the HOME Final Rule requires rental property assisted with HOME funds to be maintained in compliance with all local codes and HQS (24 CFR §982.401). To meet this requirement, all HOME rental Development Owners must annually complete an HQS inspection of all HOME assisted Units. The Department will review HQS inspection sheets for all Units for compliance with this requirement during onsite monitoring visits.

(h) Selection of Units for inspection:

(1) Vacant Units will not be inspected (alternate Units will be selected) if a Unit has been vacant for fewer than thirty (30) days.

(2) Units vacant for more than thirty (30) days are assumed to be ready for occupancy and will be inspected. No deficiencies will be cited for inspectable items if utilities are turned off and the inspectable item is present and appears to be in working order.

(i) Property damage that is the direct result of utility damage or malfunction or repair activity relating to such damage that is beyond the Development Owner's control, including, but not limited to, eruption of gas, sewer or storm sewer mains, water mains, and electrical fires, will not be taken into consideration in determining a compliance score, provided that the Development Owner did not negligently or intentionally serve as a proximate cause for the damage.

§60.120. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit (HTC). Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum applicable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that a HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the Department will report the violation as corrected on the date that the rent plus the utility allowance, plus fees, is less than the applicable limit. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions (HTC). If the Owner agreed to lease Units at rents less than the maximum allowed under the Code (additional occupancy restrictions), the Department will require the Owner to refund to the affected residents the amount of rent that was overcharged. This applies during the entire Affordability Period. The noncompliance event will be considered corrected on the date which is the later of the date the overcharged rent was refunded/credited to the resident or the date that the rent plus the utility allowance is equal to or less than the applicable limit. *Example 120(1):* For Code §42 purposes, the maximum allowable limit is 60 percent. However, the Owner agreed to lease some Units to households at the 30 percent income and rent limits. It was discovered that the 30 percent households were overcharged rent. The Owner will be required to reduce the current amount of rent charged and refund the excess rents to the households.

(c) Rent Violations of the maximum allowable limit due to application fees (HTC). Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses. The amount of time Development staff spends on checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add $5.50 per Unit for their other out of pocket costs for processing an application without providing documentation. Should an Owner desire to include a higher amount to cover staff time, wage information and a time study must be supplied to the Department upon request. Documentation of Development costs for application processing or screening fees must be made available during onsite visits or upon request. The Department will review application fee documentation during onsite monitoring visits. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee, the noncompliance will be reported to the IRS on Forms 8823 under the category Gross rent(s) exceeds tax credit limits. The noncompliance will be corrected on the later of January 1st of the next year or as of the date the application fee is reduced and evidence of a reduced application fee is supplied to the Department. Owners are not required to refund the overcharged fee amount. If the Development refunds the overcharged fee in full or in part, the units will remain out of compliance until January 1st of the next year or until the application fee is reduced.

(d) Rent or Utility Allowance Violations on Non-HTC Developments. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund to the affected residents the amount of rent that was overcharged.

(e) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess rent collected must be deposited into a trust account for the tenant. The account must remain open for the shorter of a four (4) year period, or until all funds are claimed. If funds are not claimed after the four year period, the unclaimed funds must

be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be dispersed as required by Texas unclaimed property statutes.

(f) Rent Adjustments for HOME Developments. 24 CFR §92.252 of the HOME Final Rule requires Owners to charge households with an income in excess of 80 percent at recertification, a rent equal to the lesser of 30 percent of the household's adjusted income or the market rent for comparable unassisted Units in the neighborhood. If at recertification the household self-certifies an income in excess of the 80 percent limit, documentation of all income, assets and allowable deductions must be obtained by the Owner. The Department will find a HOME Development in noncompliance with this section if the Owner fails to determine the over income household's adjusted income and maintain documentation of market rents for comparable unassisted Units in the neighborhood.

(g) Special conditions for NSP and CDBG Developments. To determine if a Unit is rent restricted, the amount of rent paid by the household, plus an allowance for utilities, plus any rental assistance payment must be less than the applicable limit.

§60.121. Notices to the Internal Revenue Service (HTC Properties).

(a) Even when an event of noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. IRS Form 8823 will be filed not later than forty-five (45) days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department) but will not be filed before the end of the correction period. The Department will indicate on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance.

(b) The Department will retain records of noncompliance or failure to certify for six (6) years beyond the Department's filing of the respective IRS Form 8823. The Department will retain the AOCRs and records for three years from the end of the calendar year the Department receives the certifications and records.

(c) The Department will send the Owner of record copies of any IRS Forms 8823 submitted to the IRS. Copies of Forms 8823 will be submitted to the syndicator for Developments awarded tax credits after January 1, 2004. The Development Owner is responsible for providing the name and mailing address of the syndicator in the Annual Owner's Compliance Report.

§60.122. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.

(a) HTC properties allocated credit in 1990 and after are required under the Code (§42(h)(6)) to record a LURA restricting the Development for at least thirty (30) years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor HTC Developments using the rules detailed in paragraphs (1) - (12) of this subsection.

(1) On site monitoring visits will continue to be conducted approximately every three years, unless the Department determines that a more frequent schedule is necessary.

(2) In general, the Department will review 10 percent of the low income files. No less than five files and no more than twenty files will be reviewed.

(3) The exterior of the Development, all building systems and 10 percent of Low Income Units. No less than five but no more than thirty-five of the Development's HTC Low Income Units will be physically inspected to determine compliance with HUD's Uniform Physical Condition Standards.

(4) Each Development shall submit an annual report in the format prescribed by the Department.

(5) Reports to the Department must be submitted electronically as required in §60.105 of this chapter (relating to Reporting Requirements).

(6) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA.

(7) All HTC households must be income qualified upon initial occupancy of any Low Income Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project based HUD program.

(8) Rents will remain restricted for all HTC Low Income Units. After the Compliance Period, utilities paid to the Owner can be accounted for in the utility allowance. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit.

(9) All additional income and rent restrictions defined in the LURA remain in effect.

(10) For Additional Use Restrictions, defined in the LURA (such as supportive services, nonprofit participation, elderly, etc), refer to the Development's LURA to determine if compliance is required after the completion of the Compliance Period.

(11) The Owner shall not terminate the lease or evict low income residents for other than good cause.

(12) The total number of required HTC Low Income Units must be maintained Development wide.

(c) After the first fifteen (15) years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) of this subsection.

(1) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low Income Unit.

(2) The building's applicable fraction found in the Development's Cost Certification and/or the LURA. Low income occupancy requirements will be monitored Development wide, not building by building.

(3) Household transfers between buildings restricted by §42(g)(1) of the Code. All households, regardless of HTC income level designation, will be allowed to transfer between buildings within the Development.

(4) The Department will not monitor the Development's application fee after the Compliance Period is over.

(d) Regardless of the requirements stated in a LURA, the Department will monitor in accordance with this section.

(e) Unless specifically noted in this section, all requirements of this chapter, the LURA and §42 of the Code remain in effect for the Extended Use Period. These Post-Year fifteen (15) Monitoring Rules apply only to the HTC Developments administered by the Department. Participation in other programs administered by the Department may

require additional monitoring to ensure compliance with the requirements of those programs.

§60.123. Material Noncompliance Methodology.

(a) The Department maintains a compliance history of each monitored Development in the Department's Compliance Status System. Developments with more than one program administered by the Department are scored by program. The Development will be considered in Material Noncompliance if the score for any single program exceeds the Material Noncompliance threshold for that program.

(b) A Development will not be assigned the scores noted in this section until after the Owner has been provided a written notice of the noncompliance and provided a corrective action deadline to show that either the Development was never in noncompliance or that the noncompliance event has been corrected.

(c) This section identifies all possible noncompliance events for all programs monitored by the Physical Inspection and Compliance Monitoring Sections of the CAO Division. However, not all issues listed in this section pertain to all Developments. In addition, only certain noncompliance events are reportable on Form 8823. Those events that are reportable under the HTC program on Form 8823 are so indicated in subsections (j) and (k) of this section.

(d) For HTC Developments, all Forms 8823 issued by the Department will be entered into the Department's Compliance Status System. However, Forms 8823 issued prior to January 1, 1998 will not be considered in determining Material Noncompliance.

(e) For all programs, a Development will be in Material Noncompliance if the noncompliance event is stated in this section to be Material Noncompliance. The Department may take into consideration the representations of the Owner regarding monitoring notices and Owner responses; however, unless an Owner can prove otherwise, the compliance records of the Department shall be presumed to be correct.

(f) All Developments, regardless of status, that are or have been administered, funded, or monitored by the Department, are scored even if the Development no longer actively participates in the program, with the exception of properties in the Federal Deposit Insurance Corporation's ("FDIC") Affordable Housing Disposition Program.

(g) A Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold provided that:

(1) The Development has no previously reported noncompliance events that are uncorrected;

(2) All newly identified noncompliance events are corrected during the corrective action period;

(3) All corrective action documentation for the newly identified noncompliance is provided to the Department during the corrective action period; and

(4) The Development was not already in Material Noncompliance at the time of its most recent monitoring review.

(h) If an Owner is unable to correct all issues during the corrective action period, the Owner may supply a corrective action plan for review by the Department that establishes dates that each uncorrected issue will be corrected and evidence of correction will be supplied. Provided that the Department approves the plan and the Owner follows the plan, upon correction of all issues, a Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold provided that:

(1) The Development has no previously reported noncompliance events that are uncorrected; and

(2) The Development was not already in Material Noncompliance at the time of its most recent review.

(i) Noncompliance events are categorized as either "Development events" or "Unit/building events". Development events of noncompliance affect some or all the buildings in the Development; however, the Development will receive only one score for the noncompliance event rather than a score for each Unit or building. Other noncompliance events are identified individually by Unit and will receive the appropriate score for each Unit cited with an event. The Unit scores and the Development scores accumulate towards the total score of the Development. Violations under the HTC program are identified by Unit; however, the building is scored rather than the Unit and the building will receive the noncompliance score if one or more of the Units in that building are in noncompliance.

(j) Uncorrected noncompliance events, if applicable to the Development, will carry the maximum number of points until the noncompliance event has been reported corrected by the Department. Once reported corrected by the Department, the score will be reduced to the "corrected value." Corrected noncompliance will no longer be included in the Development score one year after the date the noncompliance was reported corrected by the Department.

(k) Each noncompliance event is assigned a point value. The possible events of noncompliance and associated "corrected" and "uncorrected" points are listed in subsection (l) of this section.

(l) Figure: 10 TAC §60.123(l) lists events of noncompliance that affect the entire Development rather than an individual Unit. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. The Material Noncompliance threshold for a HTC and Exchange Developments is thirty (30) points. The Material Noncompliance threshold for a non-HTC Development with one (1) to fifty (50) Low Income Units is thirty (30) points. The Material Noncompliance threshold for a non-HTC Development with fifty-one to two hundred Low Income Units is fifty points. The Material Noncompliance threshold for non-HTC Developments with two hundred and one or more Low Income Units is eighty points. The third column lists the number of points assigned to the event from the date the issue is corrected until one (1) year after correction. The fourth column indicates which programs the noncompliance event applies. The last column indicates if the issue is reportable on Form 8823 for HTC Developments.

Figure: 10 TAC §60.123(l)

(m) Figure: 10 TAC §60.123(m) lists ten events of noncompliance associated with individual Units. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. The Material Noncompliance threshold for a HTC or Exchange Development is thirty (30) points. The Material Noncompliance threshold for a non-HTC property with one (1) to fifty (50) Low Income Units is thirty (30) points. The Material Noncompliance threshold for a non-HTC Development with fifty-one (51) to two hundred (200) Low Income Units is fifty (50) points. The Material Noncompliance threshold for non-HTC properties with two hundred one (201) or more Low Income Units is eighty (80) points. The third column lists the number of points assigned to the event from the date the issue is corrected until one year after the event is corrected. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on Form 8823 for HTC Developments.

Figure: 10 TAC §60.123(m)

§60.124. Previous Participation Reviews.

(a) Prior to providing any Department assistance, executing a Carryover Allocation Agreement, or processing a request for a Qualified Contract, the CAO Division will conduct a previous participation review to determine if the requesting entity controls a Development that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form, or has any unresolved audit or monitoring findings identified by the Contract Monitoring Section of the CAO Division. Previous participation reviews will also be conducted if more than one hundred twenty (120) days elapse between Board approval of an Application and a financing. Assistance includes but is not limited to allocating any Department funds or tax credits, with the exception of CSBG funds, engaging in loan or contract modifications that result in increased funding, approving a modification to a LURA (other than a technical error) and providing incentive awards.

(b) HTC Developments with any uncorrected issues of noncompliance or with pending notices of noncompliance will not be issued Form 8609s, Low Income Housing Credit Allocation Certifications, until all events of noncompliance are corrected.

(c) If during the previous participation review an uncorrected issue of noncompliance required by the HOME Final Rule is identified on a HOME Development monitored by the Department, the entity requesting assistance will be notified of the issue and provided five (5) business days to submit all necessary corrective action to cure the violation(s). The notification will be in writing and may be delivered by email. If the requesting entity does not cure the violation(s), the request for assistance will be terminated. If the request for assistance is terminated, the Board has the ability to reinstate the request for assistance for consideration as provided in §60.128(a) of this chapter (relating to Temporary Suspension of Previous Participation Reviews).

(d) If during the previous participation review, the Department determines that the requesting entity owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form, has unresolved audit or monitoring findings identified by the Contract Monitoring section of the CAO Division, or has control of an existing Development monitored by the Department that is in Material Noncompliance, the entity requesting assistance will be notified of the issue in writing and provided five (5) business days to submit all necessary corrective action, pay the fees, bring the loan current, or otherwise cure the violation(s). If the requesting entity does not cure the issue(s), the request for assistance will be terminated. If the request for assistance is terminated due to Material Noncompliance, the Board has the ability to reinstate the request for assistance for consideration as provided in §60.128(b) of this chapter.

(e) If during the previous participation review, the Department determines that the requesting entity or any person controlling the requesting entity is on the Department's or the U.S. Department of Housing and Urban Development's ("HUD") debarred list, the request for assistance will be terminated. A request for assistance properly terminated for this reason cannot be reinstated for consideration. The request for assistance can be re-submitted, however, if the person or entity that is on the debarred list is no longer part of the requesting entity.

(f) For the purposes of previous participation reviews:

(1) The Department will not take into consideration the score of a Development that the requesting entity has not controlled for at least three (3) years;

(2) The Department will not take into consideration the score of a Development for which the Affordability Period ended over three (3) years ago;

(3) The Department will not take into consideration the score attributed to a Development for noncompliance with FDIC's Affordable Housing Disposition Program;

(4) If a requesting entity no longer controls a Development but has controlled the Development at any time in the last three (3) years, the Department will determine the score for the noncompliance events with a date of noncompliance identified during the time the requesting entity controlled the Development. If the points associated with the noncompliance events identified during the requesting entity's control of the Development exceed the threshold for Material Noncompliance, the request for assistance will be terminated but may be subject to reinstatement by the Board as provided in §60.128 of this chapter.

(g) Date for determining Material Noncompliance. Previous participation reviews will be conducted prior to the Board meeting when funds will be awarded, or if the request is not subject to Board action, prior to the Department providing the requested assistance. The score in effect at the completion of the previous participation review process (which includes the five (5) business day cure period referenced in subsections (c) and (d) of this section) will be used to determine if the request for assistance will be terminated. Previous participation reviews are not required to be performed if less than one hundred-twenty (120) days have elapsed since the last review, provided there is no change in the organizational structure.

(h) Treatment of units of government during a previous participation review. If a city, county or local government applies for assistance from the Department, a previous participation review will be conducted. If the city, county or unit of government controls a Development that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form or has unresolved audit or monitoring findings identified by the Contract Monitoring Section of the CAO Division, the process described in subsection (d) of this section will be followed. However, the previous participation of individual elected officials will not be considered provided that they are not the contract executor for the requesting entity.

(i) Treatment of nonprofits during a previous participation review. If a nonprofit applies, or is associated with, an application for assistance from the Department, a previous participation review will be conducted. If the nonprofit controls a Development that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form or has unresolved audit or monitoring findings identified by the Contract Monitoring Section of the CAO Division, the process described in subsection (d) of this section will be followed. If it is determined that the Executive Director, Chair of the Audit Committee, Board Chair or any member of the Executive Committee of the nonprofit controls a Development that is in Material Noncompliance, owes the Department any fees, is sixty (60) days delinquent on a loan payment, has a past due single audit or single audit certification form or has unresolved audit or monitoring findings identified by the Contract Monitoring Section of the CAO Division, the process described in subsection (d) of this section will be followed. If within the five (5) business day period, the party with noncompliance resigns from the applicable position of the nonprofit organization requesting assistance, the noncompliance will not be taken into consideration. If it is determined that any member of the Board of the Nonprofit is on the Department's or HUD's debarred list, the request for assistance will be terminated. A request for assistance properly terminated for this reason cannot be reinstated for consideration. The request for assistance can be re-submitted, however, if the person on the debarred list resigns from the applicable nonprofit organization requesting assistance.

(j) Previous participation review for ownership transfers. Consistent with this section, the Department will perform a previous participation review prior to approving any transfer of ownership of a Development or any change in the Owner of a Development. The previous participation review shall be conducted with respect to the Developments controlled by the person coming into ownership, not with respect to the Development or Owner being transferred.

§60.125. Alternative Dispute Resolution.

(a) It is the Department's policy to encourage the use of appropriate Alternative Dispute Resolution ("ADR") procedures to assist in resolving disputes under the Department's jurisdiction. If at any time an applicant or other person would like to engage the Department in an ADR process, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

(b) In all phases of monitoring, (construction and throughout the entire Affordability Period) if a potential issue of noncompliance has been identified, Owners will be provided a written notice of noncompliance. In general, the Department will provide up to a ninety (90) day corrective action period which can and will be extended for an additional ninety (90) days if there is good cause and the Owner requests an extension during the corrective action period.

(c) Owners must respond to the Department's notice of noncompliance. If an Owner does not respond, this ADR process which is explained in this section cannot be initiated.

(d) If an Owner does not agree with the Department's assessment of compliance, they should clearly explain their position and provide as much supporting documentation as possible. If the position is reasonable and well supported, the issue of noncompliance will be cleared with no further action taken, i.e. for HTC properties, Form 8823 will not be filed with the IRS and the issue will not be scored in the Department's compliance status system.

(e) If an Owner's response indicates disagreement with the Department's assessment of noncompliance, but does not appear to be a valid concern to the Department, staff will notify the Owner in writing of their right to engage in ADR. The Owner must respond in five (5) days and request ADR. In addition, the Owner must request an extension of the corrective action deadline, if one is still available. If the Owner does not respond to the staff's invitation to engage in ADR, the Department's assessment of the violation is final.

(f) The Department must meet the Treasury Regulation requirement found in §1.42-5 and file Form 8823 within forty-five (45) days after the end of the corrective action period. Therefore, it is possible that the Owner and Department may still be engaged in ADR. In this circumstance, the Form 8823 will be filed. However, it will be sent to the IRS with an explanation that the Owner disagrees with the Department's assessment and is pursuing ADR. All Owner supplied documentation supporting their position will be supplied to the IRS. Although the violation will be reported to the IRS within the required timeframes, it will not be scored in the Department's compliance status system pending outcome of ADR.

(g) ADR is not an appropriate format for matters regarding interpretations of laws, regulations and rules. ADR can only be used when parties could reach consensus.

§60.128. Temporary Suspension of Previous Participation Reviews.

(a) An entity whose request for assistance is terminated under §60.124 of this chapter (relating to Previous Participation Reviews) may request reinstatement of the Application for consideration for approval. The request must be in writing and must be submitted to the Department within five (5) business days of the date of the Department's letter notifying the requesting entity of the termination/denial. A timely filed request for reinstatement shall be placed on the agenda for the next Board meeting for which it can be properly posted.

(b) If an Application for assistance was terminated under §60.124 of this chapter, the Board may consider reinstatement of the application only in the event that it determines, after consideration of the relevant, material facts and circumstances that:

(1) it is in the best interests of the Department and the State to proceed with the award;

(2) the award will not present undue increased program or financial risk to the Department or State;

(3) the applicant is not acting in bad faith; and

(4) the applicant has taken reasonable measures within its power to remedy the cause for the termination.

(c) Reinstatement of a terminated Application merely makes the Application eligible to be considered and does not, in and of itself, constitute approval.

§60.129. Temporary Suspension of Other Sections of This Subchapter.

(a) Temporary suspensions of other sections of this subchapter may be granted if the Board finds one or more of the following factors applicable to a Development:

(1) A natural disaster or other act of God has made the application of this subchapter to a Development infeasible for a period of time and the Governor of Texas or President of the United States has previously made a disaster declaration for the area including the Development during the relevant time period;

(2) Due to documented shortages in items necessary to complete the requirements of the subchapter, the Owner was unable to meet the subchapter requirements, this would include but not be limited to a shortage of labor, building materials, or public utilities available;

(3) A federal rule has changed that significantly changed the ability of the Owner to deliver the services required at the time the Development was placed in service or began operation provided, however, that the Board cannot waive the rule itself and the Owner must comply, but the Board may suspend the compliance score related to the violation in this situation; and/or

(4) A Development has been subjected in part to a governmental action such as partial condemnation through no fault of the Owner, eminent domain, or zoning changes that do not allow corrections of compliance issues required by the Department.

(b) Under no circumstances can the Board suspend for any period of time compliance with the HOME Final Rule or regulations issued by HUD when required by federal law.

(c) Under no circumstances can the Board suspend for any period of time Treasury Regulations, IRS publications controlling the submission of Form 8823, or any sections of 26 U.S.C. §42.

(d) Examples of items the Board could temporarily suspend include the requirement to report online; requirement to use Department approved forms; sampling size requirements for agency calculated utility allowance; or the requirement to repay overcharged rent on a HTF property.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 25, 2011.

TRD-201100311
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 14, 2011
Proposal publication date: November 26, 2010
For further information, please call: (512) 475-3916

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 3. LOSS FUNDING, INCLUDING CATASTROPHE RESERVE TRUST FUND, FINANCING ARRANGEMENTS, AND PUBLIC SECURITIES

28 TAC §§5.4161 - 5.4167, 5.4171 - 5.4173, 5.4181 - 5.4192

The Commissioner of Insurance (Commissioner) adopts new §§5.4161 - 5.4167, 5.4171 - 5.4173, and 5.4181 - 5.4192 to implement legislative changes to the Insurance Code Chapter 2210 under House Bill (HB) 4409, 81st Legislature, 2009 Regular Session, and amend the plan of operation of the Texas Windstorm Insurance Association (Association). These sections set forth procedures for making and collecting member assessments and procedures for making and assessing premium surcharges under Chapter 2210, Insurance Code.

Sections 5.4161, 5.4162, 5.4167, 5.4171, 5.4172, 5.4181 - 5.4184, 5.4186, 5.4187, and 5.4189 - 5.4192 are adopted with changes to the proposed text published in the July 30, 2010, issue of the *Texas Register* (35 TexReg 6611). Sections 5.4163 - 5.4166, 5.4173, 5.4185, and 5.4188 are adopted without changes. This adoption does not address proposed new 28 TAC §§5.4101, 5.4102, 5.4111 - 5.4114, 5.4121, 5.4131 - 5.4134, and 5.4141 - 5.4147, which were published in the July 23, 2010, issue of the *Texas Register* (35 TexReg 6476) and were also considered at the August 24, 2010 hearing and are the subject of a separate adoption order.

REASONED JUSTIFICATION. The adopted sections are necessary to implement legislative changes to the Insurance Code Chapter 2210 under HB 4409, 81st Legislature, 2009 Regular Session and create a more efficient rule structure by grouping Association loss funding mechanisms in this division. The adopted sections establish the procedures and requirements for determining and collecting member assessments and premium surcharges for the payment of class 2 public security obligations and class 3 public security obligations under the Insurance Code §2210.613 and §2210.6135. Compliance with these requirements is essential to assure the availability of Association insurance coverage for all eligible persons and properties.

Under §2210.001 of the Insurance Code, the Legislature has determined that the provision of windstorm and hail insurance is necessary for the economic welfare of the state and its inhabitants; and that the lack of such insurance in the state's seacoast territories would severely impede the orderly growth and development of the state. The Association was created by the Legislature and is intended to serve as a residual insurer of last resort for windstorm and hail insurance coverage (insurance coverage) in the catastrophe area designated by the Commissioner under the Insurance Code §2210.005. The catastrophe area is underserved for insurance coverage and consists of the 14 Texas coastal counties and parts of Harris County. The Association's purpose is to provide insurance coverage to those persons who are unable to obtain comparable insurance coverage in the voluntary insurance market. The ability to obtain insurance coverage that will provide coverage for losses resulting from windstorm and hail is crucial to the financial welfare of persons living and working in the designated catastrophe area. The absence of such coverage providing for the payment of losses results in the lack of an important element for economic stability in the region.

House Bill 4409 substantially amended how Association losses and operating expenses in excess of premium and other revenue are funded in new Subchapters B-1 and M, Chapter 2210, Insurance Code. Compliance with these requirements is essential to assure the availability of Association insurance coverage for all eligible persons and properties. The adopted sections implement the means to repay the public security obligations necessary to fund the new loss funding scheme. Thus, adoption of these sections will affect the economic welfare of the state and its inhabitants, and positively impact the orderly growth and development of the state.

The Association operates under a plan of operation which is adopted by rule. The Insurance Code §2210.151 provides that the Commissioner shall adopt by rule the Association's plan of operation to provide Texas windstorm and hail insurance in the catastrophe area. The Insurance Code §2210.152(a)(1) sets out the requirements of the plan of operation and specifies that the plan of operation must provide for the efficient, economical, fair and nondiscriminatory administration of the Association. Further, the Insurance Code §2210.152(a)(2)(G) provides that the plan of operation may include other provisions considered necessary by the Department to implement the purposes of Chapter 2210.

Historically, the Association's plan of operation has been specified in §5.4001 of this chapter (relating to Plan of Operation). Neither the Insurance Code §2210.151 nor §2210.152 require the Association's plan of operation to be in a single section of the Administrative Code. With the adoption of HB 4409 related requirements in §§5.4902 - 5.4908 and 5.4911 of this chapter (relating to Additional Requirements; Declination of Coverage; Flood Insurance; Minimum Retained Premium; Certificate of Compliance Approval Program; Certificate of Compliance Transition Program; Alter and Alteration; and Insurance Policy Forms, Endorsements, Manual Rules, Application Forms, and Underwriting Guidelines; respectively) the Department began to revise the format of the plan of operation into sections related to specific topics. Sections 5.4902 - 5.4908 and §5.4911 were adopted to control over conflicting provisions in §5.4001. The sections in this adoption have similar language with respect to control over §5.4001. However, references in this adoption

to the plan of operation incorporate both §§5.4001, 5.4902 - 5.4908, and 5.4911, unless specified otherwise.

As stated, HB 4409 substantially amended how Association losses and operating expenses in excess of premium and other revenue are funded. It is necessary that these new requirements, which amend or augment the Association's existing plan of operation, be integrated into the plan of operation. The adopted sections integrate these requirements into the plan of operation.

Thus, it is necessary to amend the plan of operation to address the following: (i) Association member assessments under the Insurance Code §2210.613 and §2210.6135; and (ii) the procedure for determining a policyholder surcharge under the Insurance Code §2210.613. It is further necessary to establish the procedures and requirements for collecting premium surcharges for the payment of class 2 public securities under the Insurance Code §2210.613.

To effect these necessary amendments, adopted §§5.4161 - 5.4167 and 5.4173 become part of the Association's plan of operation. While §5.4161 and §5.4162 include new provisions related to the implementation of HB 4409, §§5.4161 - 5.4167 also redesignate existing provisions concerning member assessments that are currently in §5.4001(c)(2) of the plan of operation into this division. The sections are being redesignated because including the Association's assessment procedure with other loss funding provisions will make it more accessible to interested persons. Further, because §5.4001 will be addressed at a later time, the existing provisions in §5.4001(c)(2) will not be repealed at this time. Rather, as provided in §5.4161(c), the redesignated sections will control over any conflicting provisions in §5.4001. Finally, the redesignated sections include nonsubstantive updates and use terminology more consistent with this adoption and current statutes and rules. Section 5.4173 is designated as part of the Association's plan of operation because it establishes the Association's procedure for determining the need for a premium surcharge and the amount of the premium surcharge.

Section 5.4171 and §5.4172 and §§5.4181 - 5.4192 are adopted to establish the procedures and requirements the insurance industry shall use for determining and collecting premium surcharges for the payment of class 2 public securities under the Insurance Code §2210.613.

The Department further recognizes that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111 - 203, H. R. 4173, July 21, 2010) (Dodd-Frank Act) was enacted by Congress after the submission of the proposal to the *Texas Register.* The Dodd-Frank Act affects the regulation of surplus lines insurance and may be determined to prohibit the inclusion of certain surplus lines premiums in the determination of assessment and premium surcharges. Therefore, §5.4162 and §5.4171 have been changed to exclude such premium and policies that a federal agency or court of competent jurisdiction determines to be exempt from inclusion in the assessment formula or subject to premium surcharge under the Insurance Code Chapter 2210.

The following explains adopted §§5.4161 - 5.4167, 5.4171 - 5.4173, and 5.4181 - 5.4192 in greater detail.

§5.4161. Member Assessments. Section 5.4161 restates existing §5.4001(c)(2)(A) of this chapter, which §5.4161 will control over. Section 5.4161 does not significantly alter existing procedural requirements, but it differs from the existing procedural requirements because the statutory funding scheme for excess losses was amended by HB 4409 and no longer relies on direct assessments to fund certain amounts. Rather, the Insurance Code, Chapter 2210, Subchapter B-1, now requires that losses in excess of the Association's premium and other revenue, the Catastrophe Reserve Trust Fund (CRTF), and available reinsurance proceeds, must be paid with the proceeds of class 1, class 2, and class 3 public securities. The Insurance Code §2210.613 and §2210.6135, provide that, if other funds are not available, up to 30 percent of the class 2 public security obligations and all of the class 3 public security obligations are payable from Association member company assessments. The Insurance Code §2210.608 requires the Texas Public Finance Authority (TPFA) to annually inform the Association of the amounts required to fund these public security obligations.

The adopted section also does not include the requirement that the Association's board of directors determine the Assessment amount. The Association's board of directors may still desire to perform this function; however, this phrasing directing the Association to determine this amount is more consistent with other sections in this division.

Also as previously discussed, §§5.4161 - 5.4167 redesignate the existing requirements in §5.4001 and incorporate them into this division. As provided in §5.4161(c), these sections will be considered part of the Association's plan of operation and shall control over any conflicting provision in §5.4001 of this subchapter. Section 5.4161(c) is adopted with a nonsubstantive change to the section references.

§5.4162. Amount of Assessment. Section 5.4162 substantially restates existing §5.4001(c)(2)(B) of this chapter. As addressed in existing §5.4001(c)(2)(B), this section establishes member participation in the assessment and thus the proportionate amount each member shall be required to pay to the Association.

Section 5.4162(a) also incorporates the HB 4409 amendments to the Insurance Code §2210.052(e), which provides that the Association may not include in the assessment an insurer that became a member of the Association after September 1, 2009, and had not previously been a member of the Association, until after the second anniversary of the date on which the insurer first becomes a member of the Association. Because the term of the class 2 or class 3 public securities issued under the Insurance Code §2210.073 or §2210.074 can be up to 10 years with a corresponding assessment period, §5.4162(a)(2) clarifies that the new member would be eligible for assessment after its second anniversary "without regard as to whether the catastrophic event that gave rise to the class of public securities occurred prior to the second anniversary of the date on which the insurer first became a member of the Association." This provision is consistent with the language of the Insurance Code §§2210.052, 2210.073, 2210.074, 2210.613, and 2210.6135 that provides the members share the loss based on their participation in the Association.

Section 5.4162(b) provides that the participation level shall be computed on a calendar year basis for the year in which the assessment is made. The participation level may thus vary over the term of the public security and will not be fixed in the year that the catastrophic event occurred.

As previously discussed, §5.4162(a)(3) has been added to this section due to the changes in federal law. This change is intended to exclude net direct written premium arising from the transaction of surplus lines business that a federal agency or court of competent jurisdiction determines to be exempt from

inclusion in the assessment formula under the Insurance Code Chapter 2210.

A systemic concern was that the insurers may determine that under a variable participation scheme it is best to stop writing wind and hail insurance coverage in the catastrophe area now and then return after the event to lower their participation percentage. The Department disagrees that insurers would reduce writings based on this requirement as a general course of action. Since Hurricane Rita, insurers have reduced writing wind and hail insurance coverage in the catastrophe area to avoid exposure to catastrophic events without regard to the effect or even the potential of an unlimited assessment under former Insurance Code §2210.058. Assessments under the HB 4409 loss funding scheme set out in the Insurance Code §2210.613 and §2210.6135 would amount to an approximate maximum of $800 million, plus interest and administrative expenses, over an eight to eleven year period following a catastrophic event depending on the date of issuance, term, covenants, and potential early repayment of the public securities. Thus, the annual assessment requirements necessary under Insurance Code §2210.613 and §2210.6135 would approximate, albeit probably be greater than, the former $100 million assessment provision in the Insurance Code §2210.058(a)(1). Therefore, the Department does not believe that this provision will affect insurer's decisions to write in the catastrophe area prior to a storm event. Further, this method may encourage insurers to reduce their participation level by writing in the catastrophe area after a catastrophic event. That would be consistent with the Legislature's expressed intent in the Insurance Code §2210.009(b) and §2210.053(b). Further, even under a fixed participation level due to the need to provide broad based funding support for the public securities, participation levels would vary due to insolvencies and carriers leaving the Texas market. This includes the entry and exit of market participants and changes in company writing practices. Under no situation would the formula be truly fixed for the entire term of the public security obligation, because the formula must consider that over the course of time some members will leave the Texas market or fail financially.

The plan of operation already provides for reallocating an assessment based on insolvency. As for insurers leaving the Texas market, the Department notes that the Insurance Code Chapter 2210 does not have a provision such as in the Insurance Code §2211.209(e), relating to the FAIR Plan Association. Barring the departure of a large market share insurer, these variances should be slight, but under either the fixed or annual basis they may be unavoidable. Also, new members are only exempt from participating in assessments for the first two years. Additionally, members could also seek to decrease their assessment by increasing their writings in the catastrophe area, an incentive which is consistent with the Insurance Code §2210.009(b) and §2210.053(b).

Further, the Association and the members would be required to prepare and use a single calculation for all assessments made during the year for class 2 public securities and class 3 public securities regardless of the year the public securities were issued. Finally, because members would have the same assessment obligation to each class 3 public security regardless of the year in which the security was issued, the TPFA might also be able to more readily refinance outstanding public securities of the same class and take advantage of changing market conditions.

For these reasons the Department has determined that the calendar year formula for determining participation levels currently used by the Association is most consistent with the requirements of the Insurance Code Chapter 2210.

The proposal also generated comments concerning the issuance and payment of class 2 and class 3 public securities. These comments requested a means of paying a lump sum assessment in lieu of participating in the public security obligation and a means of paying a lump sum towards the insurers' public security obligation.

The Insurance Code §2210.613(a) provides that 30 percent of the cost of public securities issued under the Insurance Code §2210.073 shall be paid from member assessments. The Insurance Code §2210.074(b) provides that if losses are paid with class 3 public securities, the class 3 public securities will be repaid in the manner described by the Insurance Code Chapter 2210, Subchapter M, through assessments as provided by §2210.074. Under both the Insurance Code §2210.613(a) and §2210.074(b), the Association shall notify each member of its assessment and that the proportion of losses allocable to each insurer shall be determined in the manner used to determine the insurer's participation in the Association under the Insurance Code §2210.052. The Insurance Code §2210.6135, which is in Subchapter M, has the same provisions related to notice and allocation as the Insurance Code §2210.074(b), and provides that the class 3 public securities would be paid through member assessments. The Insurance Code §2210.6135, however, further authorizes the Association to assess members up to $500 million per year.

The Insurance Code §§2210.074, 2210.613, and 2210.6135 indicate that the entire membership of the Association, and thus the Texas property insurance market, will be obligated for the repayment of the public securities. The commenter's suggestion would establish two groups with one being obligated to repay the public securities and one not being so obligated. Limiting the group would limit that public security funding resource to the financial strength of the obligated participating insurers and the potential that those insurers will continue to write in Texas until the public securities are repaid. This could limit the ability of the TPFA to issue class 3 public securities.

The question of overall repayment also holds true for an insurer seeking to prepay its proportionate share of any outstanding public security obligation in a lump sum assessment in lieu of continuing to participate in the payment of the public security obligation under the Insurance Code §§2210.074, 2210.609, 2210.613, and 2210.6135. The Insurance Code §§2210.074, 2210.609, 2210.613, and 2210.6135 do not specifically provide that a member insurer may elect to prepay its class 2 or class 3 public security obligation. Rather, the Insurance Code §2210.609 directs the TPFA to determine the amount of revenue that is required to fund the public security obligation for the current year. The Insurance Code §§2210.074, 2210.613, and 2210.6135 establish the sources of the revenue that will be used to fund that obligation. Sections 2210.074, 2210.613, and 2210.6135 provide that each insurer shall pay an assessment equal to its proportionate share of the amount due as determined under §2210.052. Thus, each member insurer is thus liable for an undivided share of the obligation until the obligation is paid in its entirety.

However, adopted §5.4145 and §5.4147 of this division (relating to Excess Class 2 Member Assessment Revenue and Excess Class 3 Member Assessment Revenue) provide that excess amounts may be used to pay class 2 public security obli-

gations payable in the subsequent year, offsetting the amount of the member assessment that otherwise would be required to be levied for that year under the Insurance Code Chapter 2210, Subchapter M. It is thus conceivable that an insurer could voluntarily overpay its current assessment obligation with an estimated payment of its subsequent year assessment, if such an arrangement was agreeable to the Association. The over-payment, however, would only work as an offset to the insurer's actual assessment in the subsequent year.

Therefore, these rules implement the Insurance Code §§2210.074, 2210.075, 2210.0613, and 2210.06135 by establishing a system that implements the Insurance Code based on those statutory provisions, including the funding of loss payments through the issuance of class 2 and class 3 public securities that shall be repaid by assessing the Association members. Further, this system reflects a single, annually determined, participation percentage rate for assessing class 2 and class 3 public securities over the course of the public securities, addressing issues resulting from member insurers beginning and ceasing to do business in Texas, and encouraging members to better their assessment position by increasing their writings in the catastrophe area which is consistent with the Insurance Code §2210.009(b) and §2210.053(b). Finally, because §5.4001 defines terms for use in §5.4001 and not this division, it is necessary to incorporate the definition and calculation of "net direct premiums" into this division, which is provided for in §5.4162(b).

Section 5.4162(c) incorporates the remainder of existing §5.4001(c)(2)(B) concerning member participation in the assessment. Section 5.4162(d) incorporates the Association's existing calendar year formula for determining participation levels that are set out in existing §5.4001(c)(2)(B)(i). Section 5.4162(d) also corrects an incomplete citation in the existing rule. The existing provision cites "subsection (a)(2)(i)(III) of this section." As all items within §5.4001(a)(2) have a following capital letter designation, the citation does not refer to any provision. The Department has determined that this provision referred to net direct premium as of 1988 using the citation "(a)(2)(I)(i)(III)." In subsequent revisions the "(I)" was inadvertently omitted. The Department is not aware of any time in which this alternative provision was used in determining participation levels. Section 5.4162(d) restates the citation as "§5.4001(a)(2)(N)(i)(III)" using the correct reference to "net written premium." This section also incorporates Figure: 28 TAC §5.4162(d), which is the same as that at §5.4001(c)(2)(B)(i).

Section 5.4162(e) restates existing §5.4001(c)(2)(B)(ii) of this subchapter concerning the Association's procedure for determining the member's participation percentage and notifying the member of that percentage. Section 5.4162(f) restates existing §5.4001(c)(2)(B)(iii) of this subchapter concerning the member's requirement to furnish to the Association on or before March 1 of each year a copy of its Exhibit of Premiums and Losses (Statutory Page 14) for the State of Texas. Finally, as necessary, §5.4162 makes nonsubstantive updates and uses terminology more consistent with this division, current statutes, and rules.

§5.4163. Notice of Assessment. Section 5.4163 restates existing §5.4001(c)(2)(C) of this subchapter which §5.4163 will control over. Section 5.4163 does not make any substantive changes to the existing provisions, but does divide the existing provision into three subsections to make it more accessible. As necessary, the section makes nonsubstantive updates and uses terminology more consistent with this §§5.4161 - 5.4167, and current statutes and rules.

§§5.4164, 5.4165, 5.4166 and 5.4167. Payment of Assessment, Failure to Pay Assessment, Contest after Payment of Assessment, and Inability to Pay Assessment by Reason of Insolvency. Sections 5.4164, 5.4165, and 5.4166 restate existing §5.4001(c)(2)(D) of this subchapter, which §§5.4164, 5.4165, and 5.4166 will control over. The sections do not make any substantive changes to the existing provisions, but do divide the existing provisions into three sections and various subsections to make them more accessible. Section 5.4167 restates existing §5.4001(c)(2)(E) of this subchapter, which §5.4167 will control over. Section 5.4167 does not make any substantive changes to the existing requirement, which address the inability of a member to pay an assessment and the reallocation of the assessment. As necessary, §§5.4164, 5.4165, 5.4166, and 5.4167 make nonsubstantive updates and use terminology more consistent with this §§5.4161 - 5.4167, and current statutes and rules. Section 5.4167 was changed to capitalize the term "Association."

§5.4171. Premium Surcharge Requirement. Section 5.4171(a) identifies insurers that are, and that are not, subject to the provisions of §§5.4171 - 5.4172 and 5.4181 - 5.4192. Several commenters, however, questioned if the premium surcharge applied to surety contracts. It is determined that the Insurance Code §2210.613 did not intend to include surety contracts and has changed §5.4171(b) to specifically exclude surety from the scope of §§5.4171 - 5.4173 and 5.4181- 5.4192. In reaching this conclusion the Department considered the context of the language in the Insurance Code §2210.613 and the decision in *Great American Insurance V. North Austin Municipal Utility District No. 1,* 908 S.W.2d 415 (Tex. 1995).

The *Great American* decision provides that under Texas law, insurance and surety are legally distinct. This differs from other states such as Florida which statutorily defines an insurer as "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity" (Florida Statutes §604.03 cited in *Snow v. Jim Rathman Chevrolet, Inc.,* 39 So.3d 368 (Fla.App. 5 Dist. 2010)). The Department does not take the position that the failure to reference terms related to surety contracts excludes those contracts from the application of a particular statute.

Thus, the Department looks to the specific terms used and the context of their usage. The Insurance Code §2210.613(c) provides that the premium surcharge applies to all "policies" described in §2210.613(b) that provide "coverage" for all "property and casualty lines of insurance." The Insurance Code §2210.613(b) provides that each "insurer," the Association and the Texas FAIR Plan Association shall assess a premium surcharge to its policyholders. Further, the term "insurer" is defined for use in the Insurance Code Chapter 2210, Subchapter M under §2210.602(6) as "each property and casualty insurer authorized to engage in the business of property and casualty insurance in this state and an affiliate of such an insurer, as described by §823.003, including an affiliate of that is not authorized to engage in the business of property and casualty insurance in this state." The use of the terms "insurer," "policyholders," "policies," "coverage," and "property and casualty lines of insurance" in these contexts indicate that the Legislature was addressing insurance contracts only rather than taking a more expansive view of applying the premium surcharge to both insurance and surety contracts.

Based on comments concerning costs associated with implementing §§5.4171 - 5.4173 and 5.4181- 5.4192, the Commissioner has also considered other alternatives to accomplish the statutory requirements. It is recognized that insurers do not rate coverage or allocate premium for some lines of property and casualty insurance based on the location of an insured's operation. Further, even those insurers that write property lines in addition to other lines may not have systems that can readily identify and communicate this type of information internally because it was unnecessary prior to the enactment of HB 4409. Thus, allocating such previously unallocated premium to the catastrophe area will require insurers writing such lines to incur significant costs in upgrading their systems and information gathering requirements.

The Insurance Code §2210.613(c), however, requires that the premium surcharge apply to all policies that provide coverage on any premises, locations, operations, or property located in the catastrophe area for all property and casualty lines of insurance, other than the four listed exceptions. Thus the option is either to allocate the premium to the catastrophe area or surcharge the total premium of any policy meeting those qualifications.

An apparent intent of HB 4409 in reducing the Association's reliance on statewide assessments was to shift greater responsibility for Association losses to the catastrophe area. A premium surcharge of the total policy premium, while affecting property and operations in the catastrophe area, would also spread the Association's costs throughout the state. This spreading would be unequal, however, as it would only affect persons with property or operations in the catastrophe area. Further, the amount of the surcharge would be unrelated to the actual exposure in the catastrophe area versus the remainder of the state. This could result in commercial operations choosing not to do business in the catastrophe area. Thus, a premium surcharge on the total premium would be inconsistent with the intent of HB 4409 and could adversely impact the economy of the catastrophe area, and thus the state, which is inconsistent with the purpose of the Insurance Code Chapter 2210, as described in §2210.001.

Therefore, the remaining option is to develop procedures to allocate the premium to the catastrophe area so that the premium surcharge may be assessed in compliance with the Insurance Code §2210.613. Several means of reducing the expense of implementing this requirement have been addressed in this adoption. Additionally, the Legislature may reconsider the premium surcharge and allocation based on the cost factors outlined in the proposal, which is expected to range from several hundred thousand dollars to several million dollars per insurer or insurer group.

Time periods for implementing these sections have also been evaluated and extended based on the timing of this order. The proposal was made during hurricane season with the possibility that a hurricane could occur within months of the proposal. The timing of this adoption, however, provides additional time for implementation prior to the next hurricane season. Therefore, §5.4171(d) has been added to read: "For all lines of insurance subject to §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) this section, §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division are effective June 1, 2011." Additionally, §5.4171(e) has been added to read: "For all other lines, this section, §§5.4172, 5.4173, and 5.4181 - 5.4192 of this division are effective October 1, 2011." The requirement in §5.4192(b) has been revised to provide as follows: (1) for policies subject to §5.4182, compliance is required for all policies *in force* on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011. Finally §5.4171 is adopted with nonsubstantive change to the section references.

§5.4172. Premium Surcharge Definitions. Section 5.4172 provides definitions used in this §§5.4171 - 5.4172 and 5.4181 - 5.4192. The definitions are derived in part from Subchapter M, Chapter 2210 of the Insurance Code. The definition of "insurer" was expanded from the definition contained in Subchapter M, Chapter 2210 of the Insurance Code to include the Association and the Texas FAIR Plan Association (FAIR Plan). The Insurance Code §2210.613 provides that premium surcharges also apply to Association and FAIR Plan policyholders that reside in, or have insured property or operations in the catastrophe area. This section also provides definitions for "insured property," "premises," and "operations," since these terms are not defined in the Insurance Code §2210.613.

In response to comments concerning the use of the term "resides in" the definition of operations was reconsidered. The intent of using the term "resides in" was to require insurers to surcharge personal automobile policies only if the insured resided in the catastrophe area, notwithstanding whether the insured regularly drives to, within, or through the catastrophe area. The alternative reading based on the location of a business owner or board member's residence was unintended. To reduce this potential for confusion the definition of "operations" in §5.4172(6) has been changed to remove the term "resides in" and to specifically reference automobiles located in the catastrophe area. Further, to be consistent with the terminology, references in §5.4172(4) and §5.4182(a)(1) have been conformed to refer to the term "automobile" or "auto," rather than motor vehicle. These changes will have no effect on any decision to surcharge automobile policies, because §5.4182(a)(1) provides that the surcharge is based on the location where the automobiles are principally garaged. Finally §5.4172 is adopted with nonsubstantive change to the section references.

§5.4173. Determination of the Surcharge. Section 5.4173 establishes the procedure for the Association to request Commissioner approval of a premium surcharge in an amount that is sufficient to fund class 2 public security obligations, including any required contractual coverage amounts that are reported to the Association by the TPFA.

§§5.4181 - 5.4183. Premiums to be Surcharged, Allocation Method for Specified Lines of Insurance, and Allocation Method For Other Lines of Insurance. Insurance policies can provide coverage for risks located in a single location, risks located in multiple locations, or even property in transit. Some insurance coverages, such as property insurance, are rated based on the specific location of the risk, and thus insurers can determine how much of the policy premium relates to insured property or operations located within the catastrophe area. Other lines of insurance may require an allocation calculation. Section 5.4181 sets forth which premium is to be surcharged. Section 5.4182 provides the method for determining the premium surcharge for certain lines of insurance, including fire; allied lines; multi-peril crop; farmowners; homeowners; commercial multi-peril (property); commercial multi-peril policies written on an indivisible premium basis; earthquake; boiler and machinery; burglary and theft; private passenger auto; and commercial auto policies rated based on the location of the vehicle(s). Section 5.4183 establishes the procedure for determining the premium surcharge for other lines of insurance, including those that are not rated based on the specific location of the risk.

In considering comments on the proposal it was determined that certain nonsubstantive grammatical changes were necessary to §5.4181(a)(2). Specifically, the references to premium tax, surplus lines premium tax, and independently procured premium tax should be separated by semicolons, and this change has been made. Additionally, the reference "surplus lines premium taxes" has been changed to "surplus lines premium tax."

Section 5.4182(a)(1) specifically lists the lines of insurance where a direct method of determining the surcharge is required. The lines of insurance listed in §5.4182 are lines where insurers know, or should know, the geographic location of their risks. Section 5.4183 has been changed as a result of comments to specify that it applies to all other applicable lines of insurance not specified in §5.4182. Thus, §5.4183 does not apply to those lines listed in §5.4182, nor does it apply to lines, insurers, premiums, or policies excluded under §5.4171(b) and (c).

Finally, §5.4182(a)(1) has been changed to make the list more complete with the addition of earthquake, boiler and machinery; burglary and theft coverage. In addition, in reviewing comments related to the use of the commercial property premium for the determination of the catastrophe allocation percentage under §5.4183, it was determined that policies written under the commercial multi-peril (liability) line of insurance are more appropriately covered under §5.4183(2). However, commercial multi-peril policies written on an indivisible premium basis were retained under §5.4182. These policies, similar to homeowner's policies, are rated in a manner such that a separate property and liability premium is not determined. Because of their similarity to homeowners policies in this regard, the Department believes the surcharge should be determined in a similar manner.

In comments on the proposal it was noted that the term "operations" in the Insurance Code §2210.613(c) is vague and ambiguous and will lead to confusion for insurers who have to determine how to apply the statute and rule's surcharge provisions. This may be especially true for lines such as directors' and officers' liability insurance, general liability insurance, which may not be tied to specific locations, as well as commercial automobile liability insurance which may provide coverage for vehicles traveling through the catastrophe area on a regular basis. For this reason §5.4173(6) defines the term "operations" as "[A] person's interest in property, or activities, that may result in, or give rise to, a loss that is insurable under a property or casualty insurance policy, including the use of an automobile; ownership, lease, or occupancy of a residence or other real property; and activities performed by a person in connection with the manufacture, distribution, or sale of goods or services. A person is considered to have operations in the catastrophe area if the person maintains an automobile or a physical location in the catastrophe area, regardless of whether that location is owned, leased, rented, or occupied by the person."

Therefore, an insured is not considered to have "operations" in the catastrophe area unless the insured maintains an automobile or a physical location within the catastrophe area. So, for example, a commercial automobile insured that traveled intermittently through the catastrophe area but did not maintain a business location in the catastrophe area where operations are performed, would not be subject to the premium surcharge.

Further, as suggested in comments, as a means to avoid confusion and uncertainty for businesses that have premises, operations, or insured property located both in and outside the catastrophe area, proposed §5.4183 has been changed to provide for the use of the allocation percentage indicated by the insured's commercial property insurance premium in cases where the insurer also provides commercial property insurance to the insured.

Property in the catastrophe area is a significant factor indicating "operations" in the catastrophe area. Since the insurer is already required to determine the percentage of premium attributed to the catastrophe area for its insured's commercial property policy, this information should be available to the insurer. In cases where the insurer also provides commercial property insurance to the insured and the insurer cannot reasonably determine or allocate the other premium to the catastrophe area, the insurer will determine the catastrophe area allocation percentage as the ratio of the commercial property premium attributable to the catastrophe area, divided by the total Texas premium of the commercial property policy. The insurer will then apply this allocation percentage to the insured's Texas premium for lines of insurance covered under §5.4183. As revised, §5.4183 also provides that in the case where the insurer does not provide commercial property insurance to the insured, the percentage of premium attributable to the catastrophe area shall be determined by the insurer from information provided by its insured. Insurers are not required to verify or otherwise determine the reasonableness of the allocation percentage provided by the insured.

Section 5.4183 should reduce disputes between insurers and insureds over the premium allocation. In the case where the insurer also writes the insured's commercial property, there should be no dispute as to the allocation. In the case where the insurer does not write the insured's commercial property, the insurer may rely on information provided by the insured. Because of these changes the proposed provisions for establishing a default allocation that increased over time and the appeal procedure requirement for handling disagreements between the insurer and the insured have been removed.

This allocation methodology is adopted with the awareness that some insureds, or insurers on the insured's behalf, might seek to underestimate the amount of premium attributable to the catastrophe area as a means to avoid paying their "full" surcharge. Seeking to reach a perfect allocation, however, is an impractical solution to this problem and would only result in requiring insurers and insureds alike to incur significant additional costs. The adopted allocation methodology provides a reasonable means to implement the Insurance Code §2210.613 at this time. If necessary, the adopted allocation methodology in §5.4182 and §5.4183 may be refined in the future based on experience.

Finally, the Department disagrees that insurer underreporting could lead to a completely unreliable and unpredictable revenue stream which may result in problems when marketing the public securities. The Department consulted with the TPFA regarding this question and was informed that such a result was unlikely. First, the premium surcharge will be based on the reported premium in the catastrophe area as required in the Insurance Code §2210.613. If premium is underreported, the result would be a greater percentage premium surcharge and not an unpredictable revenue stream. Second, to the extent that such reporting did raise a concern, the lenders would require an additional contractual coverage requirement (an amount required to be collected annually in excess of the principal, interest and expenses due on the public securities) to cover any uncertainty in the revenue stream. To the extent that an additional contractual coverage amount was required, any excess class 2 premium surcharge revenue would be distributed annually as provided in the Insur-

ance Code §2210.611. Thus, marketability of the bonds would not be endangered.

The changes to the allocation methodology set forth in §5.4183 requires conforming changes to the proposed text in §§5.4184(d), 5.4184(f), 5.4187(a), 5.4189, 5.4190(e), and 5.4192(b).

§5.4184. Application of the Surcharges. Section 5.4184 provides that all applicable policies with effective dates on or after the date of the Commissioner's surcharge order are to be surcharged. It also makes clear that insurers are not responsible for collecting surcharges on policies that did not go into effect, or were cancelled as of the inception date, as well as provides instructions for surcharging policies that remain in effect for multiple years. Section 5.4184 further establishes how premium surcharges are to be determined when the policy is either cancelled mid-term or the premium is changed on the policy in the middle of the policy period. The Insurance Code §2210.613 states that premium surcharges are non-refundable, thus there is no refund for the "unexpired" portion of the surcharge when a policy is cancelled prior to the expiration date. Similarly, since premium surcharges are non-refundable, when the premium on the policy is changed in mid-term resulting in a *reduction* in the total policy premium, there is no commensurate refund of the surcharge, but there is a commensurate increase in the premium surcharge for mid-term changes resulting in an increase in the premium.

In consideration of comments, §5.4184(b) has been changed to reflect that an additional surcharge is not required for a reinstated policy. This change was done to conform with such provisions as the Insurance Code §551.106. Although commenters used other terms such as reissue with regards to this concept, the term reinstated was selected because it is used in the Insurance Code §551.106. The revised provision also provides that for the purposes of this division a policy is reinstated if it covers the same period as the original policy without a lapse in coverage, except as provided in the Insurance Code §551.106. Policies that do not meet this definition of reinstated, regardless of what the practice is called, are subject to an additional surcharge.

The purpose of the language in §5.4184(c) regarding "all transactions on a policy occurring within a seven day period" is to recognize that multiple related transactions on a policy may occur over the course of several days. The purpose is to allow insurers to combine the premium effect of all policy transactions over a short period of time to determine the amount of any additional premium that may apply to the policy. For example, an insured may add a new vehicle to a policy and several days later delete an old vehicle. The purpose is to allow insurers to "net out" these transactions before determining if they result in an additional premium and an additional premium surcharge is required. The Department is aware that this may result in additional programming and systems costs to insurers, however, it should also reduce conflicts between insurers and insureds related to the order transactions are completed and concepts of continuous coverage.

Further with respect to §5.4184(c), the requirement is that a premium surcharge be applied to any additional premium. If this provision were not included, insureds could attempt to reduce their surcharge by purchasing minimal coverage initially and then immediately adding additional coverage to that policy. As for the amount of the additional premium and the premium surcharge, many insurers already have rules in place that waive additional or return premiums for what may be considered "de minimus" amounts. Thus, the insurer has already determined that any additional (or return) premium is above a "de minimus" amount. For additional premiums, if the insurer has determined it is worth the cost of collecting the additional premium, as such, an additional surcharge should also be collected in these cases.

Section 5.4184(f) addresses policies that are subject to premium audits, retrospective rating adjustments, or other similar adjustments that occur after policy expiration. In the case of a policy subject to audit or retrospective rating adjustments, the premium paid at policy inception is merely a "deposit premium" and not the "policy premium." In this case there is the expectation of the insurer and insured that the "policy premium" will be determined after retrospective rating adjustments or audit adjustments. This differs from a mid-term adjustment to the policy premium considered under §5.4184(c), because there was no expectation that the premium paid at the policy inception would later be adjusted and the actual premium would be determined after the policy expired. Further, §5.4184(f) only applies to an audit adjustment that results from an audit after the policy expires. Thus, §5.4184(f) should not result in new costs to the insurer based on determining cancelation return premium and mid-term change return premium.

Finally §5.4184(d) and (f) have been changed to conform with the previously discussed changes in §5.4183.

§5.4185. Premium Surcharges are Mandatory. Section 5.4185 provides that premium surcharges are mandatory, and are paid on a "first dollar" basis. Insurers may not pay the surcharge on behalf of the insured, and insurers must apply policyholder payments to the surcharge before applying any payments to premiums or other amounts owed to the insurer. Section 5.4185(c) also reiterates the provision in Insurance Code §2210.613(d) that failure to pay a premium surcharge constitutes failure to pay premium for the purposes of policy cancellation.

§5.4186. Remittance of Premium Surcharges. Section 5.4186 establishes the procedure for remitting collected premium surcharges to the Association and has been changed in response to comments to provide that insurers shall remit all surcharges paid by its insureds not later than the last day of the month following the month in which the surcharge was received.

Section 5.4186 does not provide that the Surplus Lines Stamping Office of Texas (SLSOT) will be the primary source of collection and reporting surplus lines information required under §5.4186. Such an action would require amending the SLSOT's plan of operation, which was not contemplated in the proposal or evaluated for cost. The Department will continue to receive information related to whether the SLSOT should be required to collect the information related to surplus lines insurers. Further, §5.4186(a) makes clear that surplus lines insurers will ultimately be held responsible for the failure of its agents to comply with these rules. Additional language stating what may and may not be placed in a contract between an insured and its agent as a result of these rules is not necessary.

§5.4187 and §5.4188. Offsets and Surcharges not Subject to Commissions or Premium Taxes. Section 5.4187 provides a method for crediting an insurer for surcharges previously paid that were not due to the Association. Section 5.4187(a)(3) has been removed to conform with the changes in §5.4183. Section 5.4188 provides that premium surcharges are neither subject to agents' commissions nor premium taxes. This reiterates the language contained in Insurance Code §2210.613(d), and prohibits an insurer from increasing the surcharge in order to pay agents'

commissions or premium taxes on a surcharge, and prohibits an agent from collecting or charging a commission on a surcharge.

§5.4189. Notification Requirements. Section 5.4189 provides that insurers must provide insureds subject to a premium surcharge a uniform notice that a premium surcharge has been applied to their policy. Section 5.4189(a) provides the text of the notice required for all policyholders subject to the premium surcharge. In response to comments that the notice was not consumer friendly, the notice has been revised. The bracketed area of the revised notice allows the insurer the option of including the amount of the surcharge, as required by §5.4189(b), either in this notice or a separate document. In response to comments that providing the notice to applicants creates an undue burden, §5.4189(c) has been revised to require that notice of the premium surcharge will be provided only be provided at the time the policy is issued, in the case of new business, and with the renewal notice, in the case of renewal business. In a conforming change based on previously discussed changes to §5.4183, proposed language in §5.4189(c) and (e) concerning additional information that insurers were to have provided policyholders has been removed. In responses to comments, §5.4189(c) has also been revised to extended the time period for providing the notice following a mid-term policy change from 10 to 20 days after completion of the transaction. This time period remains the same for all insurers and surplus lines insurers. The requirement that the notice be sent with a renewal notice has not been changed.

§5.4190 and §5.4191. Annual Premium Surcharge Report and Premium Surcharge Reconciliation Report. Section 5.4190 and §5.4191 specify the types of information insurers are required to maintain for the purposes of determining compliance with §§5.4171 - 5.4173 and 5.4181 - 5.4188. Section 5.4190 requires insurers to provide an annual report to the Association which provides information regarding the amount of premium collected subject to surcharge, the amount of premium surcharges remitted to the Association, and the amount of premium surcharges collected by the insurer during the previous calendar year. In response to comments, the required time period for providing these reports to the Association is been extended from 60 to within 90 days after the end of a calendar year in which a surcharge is in effect. However, annual reports are not required if a surcharge has been in effect for less than 45 days in the applicable calendar year. Each insurance company is required to provide an annual report.

Section 5.4190 has been revised to remove the requirement that the annual premium surcharge report be provided by line of business. This was done in response to a comment that the requirement to report collected premium surcharges by line of business placed a significant cost burden on insurers. The Department will monitor the data collection to make certain that current measures are sufficient to fulfill the requirements of the Insurance Code §2210.613. Further, in response to a comment suggesting a simplified reporting scheme, §5.4190(e)(4)(A) - (C) have been combined under subparagraph (A) and subparagraph (D) has been redesignated as subparagraph (B). It is anticipated that this change will reduce insurer compliance costs. Finally, §5.4190(e)(4)(A) has been revised to conform with the changes to the allocation methodology that has been previously discussed in §5.4183.

Also as a matter of clarification, §5.4190 does not require SLSOT to make any changes to its reporting system or report on behalf of affiliated surplus lines insurers. However, §5.4190 does not prohibit SLSOT from reporting on behalf of surplus lines insurers if SLSOT and the insurer agree to such an arrangement.

Section 5.4191 requires insurers to maintain sufficient records in order to, within 10 days of a request, provide the Department with a reconciliation report for a time period specified in the request. These reports are adopted under the authority set forth in the Insurance Code §2210.008, because the reports are necessary to ensure compliance with §§5.4171 - 5.4173 and 5.4181 - 5.4188 and, as such, are necessary to the implementation of Chapter 2210. The purpose of the reports is to track the actual collection of premium surcharges and enhance compliance with the premium surcharge requirements.

As discussed, §5.4190 has been revised generally to remove references to collecting and providing premium surcharge information by line of business. Because §5.4191 would rely on the same information, the requirement that annual premium surcharge information be available by line of business has also been removed from this section in response to a comment. Additionally, because a reconciliation report is considered a regulatory report, §5.4191(b) has been revised to provide that only the Department may request a reconciliation report under §5.4191.

With respect to both §5.4190 and §5.4191, a commenter noted that because the surcharge report and annual premium surcharge reconciliation report ask for premium written in the calendar year, as well as premium surcharges collected in the calendar year, these figures are never going to reconcile because written premium is different from collected premium. Under the example offered by the commenter, if a company writes a policy in December the company would report the full annual premium as written premium; but if the premium were billed on an installment basis, the company would only be allowed to collect surcharge on the first installment of premium. The Department disagrees that the commenter's example exposes a significant flaw.

Some mismatches may occur between calendar year written premium and surcharges collected for the same period of time. The Department, however, believes that the reports will provide useful information for the Department and Association concerning the collection of premium surcharges. Further, the Department does not consider it necessary at this time for insurers to incur additional costs to enhance the reconciliation of these reports. Additionally, the commenter's example incorrectly states that under an installment plan only one month of the surcharge would have been collected. As previously discussed, §5.4185(b) requires insurers to apply money received from the insured to the premium surcharge prior to applying funds to premium or any other obligations. Section 5.4185(b)(1) clarifies this requirement by prohibiting insurers from allocating pro-rata or otherwise mixing premium surcharges with premium over installment plan payments.

Finally, §5.4190 and §5.4191 have been revised to conform to the determination that §§5.4171 - 5.4173 and 5.4181- 5.4192 do not apply to surety contracts as previously discussed in §5.4171.

§5.4192. Data Collection. Section 5.4192 requires each insurer to maintain sufficient records in order to report certain information to the Department. This information will provide the premium base available to be surcharged and thus is necessary to the implementation of the Insurance Code §2210.613. This section does not change, is not intended to change, and should not be construed as changing, any statistical plan reporting require-

ments established pursuant to the Insurance Code Chapter 38 or other requirement.

Section 5.4192(b) has been changed to modify the reporting requirement and provide an extension for insurers using the allocation methodology established in §5.4183. Proposed §5.4192(b) established the requirement for all policies with effective dates on or after October 1, 2010. This requirement in §5.4192(b) has been revised to provide as follows: (1) for policies subject to §5.4182, compliance is required for all policies *in force* on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011.

The change is necessary because it is possible that there may be a catastrophic event in 2011. The TPFA will need reliable catastrophe area premium information to secure the issuance of any public securities that may be issued under the Insurance Code §2210.073. Additionally, if a surcharge is needed, the Commissioner and the Association must be able to obtain reliable catastrophe area premium information in a timely manner in order to determine any necessary premium surcharge percentage. Further, it is anticipated that the lines of insurance subject to §5.4182 will make up the bulk of the catastrophe area premium.

As previously discussed, for lines of insurance subject to §5.4182, insurers already know, or should already know, the geographic location of these risks. In addition, for residential and commercial property lines of insurance, insurers should know premiums attributable to risks located in the catastrophe area.

The Department recognizes that for lines of insurance other than residential and commercial property, insurers may not know whether a Harris County insured is located within those portions of Harris County designated as a catastrophe area. The Department believes the October 1, 2011 date provides sufficient time for insurers to make this determination for policies in force on that date.

For lines of insurance subject to §5.4183, insurers may not know the geographic location of its insureds. Thus, the requirement for compliance with §5.4192 is extended to apply to those policies effective on or after October 1, 2011.

HOW THE SECTIONS WILL FUNCTION. The sections implement legislative changes to the Insurance Code Chapter 2210 under HB 4409, 81st Legislature, 2009 Regular Session, and create a more efficient rule structure by grouping Association loss funding mechanisms in this division.

§5.4161. Member Assessments. Section 5.4161(a) provides that the Association shall determine if a member assessment is necessary to fund the Association's outstanding class 2 and class 3 public security obligations based upon the evaluation of information provided to the Association by the Texas Public Finance Authority. Section 5.4161(b) provides that if the Association determines an assessment to be reasonable and necessary, the Association shall assess its member insurers. Section 5.4161(c) establishes that §§5.4161 - 5.4167 shall control over any conflicting provision in §5.4001 of this subchapter.

§5.4162. Amount of Assessment. Section 5.4162(a) provides that the Association shall determine which of its members shall participate in the assessment. This includes determining if the member is eligible for the two year exemption period. Section 5.4162(b) provides that the member participation shall be determined in the year the assessment is made and not the year of the occurrence, unless they are the same. Section 5.4162(c) provides that each member shall pay its proportionate share of the assessment. Section 5.4162(d) sets out how each member's share of the assessment shall be calculated. Section 5.4162(e) addresses the Association's procedure for determining the member's participation percentage and notifying the member of that percentage. Section 5.4162(f) establishes the requirement that each member must furnish to the Association on or before March 1 of each year a copy of its Exhibit of Premiums and Losses (Statutory Page 14) for the State of Texas which shall also be used in determining the member's participation percentage.

§5.4163. Notice of Assessment. Section 5.4163 provides the procedure by which the Association shall give notice of an assessment to its members and addresses how members may appeal their individual assessments.

§5.4164. Payment of Assessment. Section 5.4164 provides that the assessment must be paid within 30 days of receipt of the assessment notice.

5.4165. Failure to Pay Assessment. Section 5.4165 addresses the procedure and remedies if a member insurer fails to pay its assessment.

5.4166. Contest after Payment of Assessment. Section 5.4166 provides the procedure for a member to contest its assessment even after payment of the assessment.

5.4167. Inability to Pay Assessment by Reason of Insolvency. Section 5.4167 addresses the reallocation of an insolvent members share amongst the remaining members.

§5.4171. Premium Surcharge Requirement. Section 5.4171(a) - (c) identify insurers that are, and that are not, subject to §§5.4171 - 5.4173 and 5.4181 - 5.4192. Section 5.4171(d) has been added to read: "For all lines of insurance subject to §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) this section, §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division are effective June 1, 2011." Additionally, §5.4171(e) has been added to read: "For all other lines, this section, §§5.4172, 5.4173, and 5.4181 - 5.4192 of this division are effective October 1, 2011."

§5.4172. Premium Surcharge Definitions. Section 5.4172 provides definitions used in §§5.4171 - 5.4173 and 5.4181 - 5.4192. The definitions are derived in part from Subchapter M, Chapter 2210 of the Insurance Code. The definitions are in addition to those adopted in §5.4102 of this division.

§5.4173. Determination of the Surcharge. Section 5.4173 establishes the procedure for the Association to request Commissioner approval of a premium surcharge in an amount that is sufficient to fund class 2 public security obligations, including any required contractual coverage amounts that are reported to the Association by the TPFA.

§§5.4181 - 5.4183. Premiums to be Surcharged, Allocation Method for Specified Lines of Insurance, and Allocation Method For Other Lines of Insurance. Section 5.4181 sets forth which premium is to be surcharged. Section 5.4182 provides the method for determining the premium surcharge for certain lines of insurance, including fire; allied lines; multi-peril crop; farmowners; homeowners; commercial multi-peril (property); commercial multi-peril policies written on an indivisible premium basis; earthquake; boiler and machinery; burglary and theft; private passenger auto; and commercial auto policies rated based on the location of the vehicle(s). Section 5.4183 establishes the procedure for determining the premium surcharge for other

lines of insurance, including those that are not rated based on the specific location of the risk.

§5.4184. Application of the Surcharges. Section 5.4184 provides that all applicable policies with effective dates on or after the date of the Commissioner's surcharge order are to be surcharged. The section also makes clear that insurers are not responsible for collecting surcharges on policies that did not go into effect, or were cancelled as of the inception date, as well as provides instructions for surcharging policies that remain in effect for multiple years. Section 5.4184 further establishes how premium surcharges are to be determined when the policy is either cancelled mid-term or the premium is changed on the policy in the middle of the policy period. The Insurance Code §2210.613 states that premium surcharges are non-refundable, thus there is no refund for the "unexpired" portion of the surcharge when a policy is cancelled prior to the expiration date. Similarly, since premium surcharges are non-refundable, when the premium on the policy is changed in mid-term resulting in a *reduction* in the total policy premium, there is no commensurate refund of the surcharge, but there is a commensurate increase in the premium surcharge for mid-term changes resulting in an increase in the premium. Section 5.4184(f) addresses policies that are subject to premium audits, retrospective rating adjustments, or other similar adjustments that occur after policy expiration.

§5.4185. Premium Surcharges are Mandatory. Section 5.4185 provides that premium surcharges are mandatory, and are paid on a "first dollar" basis. Insurers may not pay the surcharge on behalf of the insured, and insurers must apply policyholder payments to the surcharge before applying any payments to premiums or other amounts owed to the insurer. Section 5.4185(c) also reiterates the provision in Insurance Code §2210.613(d) that failure to pay a premium surcharge constitutes failure to pay premium for the purposes of policy cancellation.

§5.4186. Remittance of Premium Surcharges. Section 5.4186 establishes the procedure for remitting collected premium surcharges to the Association. It provides that insurers shall remit all surcharges paid by its insureds not later than the last day of the month following the month in which the surcharge was received.

§5.4187 and §5.4188. Offsets and Surcharges not Subject to Commissions or Premium Taxes. Section 5.4187 provides a method for crediting an insurer for surcharges previously paid that were not due to the Association. Section 5.4188 provides that premium surcharges are neither subject to agents' commissions nor premium taxes. This reiterates the language contained in the Insurance Code §2210.613(d), and prohibits an insurer from increasing the surcharge in order to pay agents' commissions or premium taxes on a surcharge, and prohibits an agent from collecting or charging a commission on a surcharge.

§5.4189. Notification Requirements. Section 5.4189 provides that insurers must provide insureds subject to a premium surcharge a uniform notice that a premium surcharge has been applied to their policy. Section 5.4189(a) provides the text of the notice required for all policyholders subject to the premium surcharge. The bracketed area of the notice allows the insurer the option of including the amount of the surcharge, as required by §5.4189(b), either in this notice or a separate document. Section 5.4189(c) establishes requirements regarding the form of the notice and when the notice must be delivered.

§5.4190 and §5.4191. Annual Premium Surcharge Report and Premium Surcharge Reconciliation Report. Section 5.4190 and §5.4191 specify the types of information insurers are required to maintain for the purposes of determining compliance with §§5.4171 - 5.4173 and 5.4181 - 5.4188. Section 5.4190 requires insurers to provide an annual report to the Association which provides information regarding the amount of premium collected subject to surcharge, the amount of premium surcharges remitted to the Association, and the amount of premium surcharges collected by the insurer during the previous calendar year.

Section 5.4191 requires insurers to maintain sufficient records in order to, within 10 days of a request, provide the Department with a reconciliation report for a time period specified in the request.

§5.4192. Data Collection. Section 5.4192 requires each insurer to maintain sufficient records in order to report certain information to the Department. This information will provide the premium base available to be surcharged and thus is necessary to the implementation of the Insurance Code §2210.613. This section does not change, is not intended to change, and should not be construed as changing, any statistical plan reporting requirements established pursuant to the Insurance Code Chapter 38 or other requirement. As to the reporting requirement, §5.4192(b) provides as follows: (1) for policies subject to §5.4182, compliance is required for all policies *in force* on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011.

SUMMARY OF COMMENTS AND AGENCY RESPONSE TO COMMENTS. During the August 24, 2010 public hearing the Commissioner extended the period for submitting written comments by five days. The Department considers the extension to include only business days. Thus, the original date for the submission of written comments of Monday, August 30, 2010, was extended through the Labor Day weekend and expired at 5:00 p.m., Tuesday, September 7, 2010.

General. A commenter questioned whether the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) would prohibit premium surcharges on some surplus lines insurance policies.

Agency Response. The Dodd-Frank Act affects the regulation of surplus lines insurance and may be determined to prohibit the inclusion of certain surplus lines premiums in the determination of premium surcharges and assessments. Because the Dodd-Frank Act was adopted after the proposal was submitted to the *Texas Register* it was not considered in the proposal. Further the Department is not aware of any final decision exempting surplus lines premium or policies from the application of the Insurance Code Chapter 2210. However, because the possibility does exist §5.4162 and §5.4171 have been changed to exclude such surplus lines premium and policies that a federal agency or court of competent jurisdiction determines to be exempt from assessment or premium surcharge under the Insurance Code Chapter 2210.

General. A commenter suggested that the Association be required to semiannually evaluate its capital position, including capacity to pay claims at varying levels of catastrophe loss, expenses, expected costs of capital and the consideration of funding sources such as reinsurance.

Agency Response. The requirements and costs that would be involved in implementing the commenter's suggestion were not addressed in the proposal. Such matters, however, may be considered by the Association's Board of Directors without the need for an additional requirement.

General. A commenter questioned as to whether public security funding was limited to $2.5 billion per catastrophe event or whether the Department interprets the Insurance Code Chapter 2210 to permit the issuance of additional public securities in subsequent years for a prior event if the first years public securities are insufficient to fund the losses.

Agency Response. The Department considers the Insurance Code Chapter 2210 to authorize the latter approach. The authorized amount of public securities that may be issued per year is limited; however, under the statute and this adoption, over time funding is only limited by the amount of public securities of any class that may be issued. As previously discussed in this adoption, the limit of public securities that may be issued to fund excess losses under the Insurance Code Chapter 2210, Subchapter B-1, is $2.5 billion per year. This adoption also notes that public security funding may be further limited and reduced based on market conditions. However, while §§2210.072 - 2210.074 limit the authorized amount of public securities that may be issued "per year," these limits are not directly tied to losses resulting from an occurrence or series of occurrences in that year.

The Insurance Code Chapter 2210, Subchapter B-1, does not define the term "year." Because the Association is at greatest risk of a catastrophic event during hurricane season, which occurs June through November, it is reasonable to consider this period to be a calendar year and not twelve months between public security issuances. This is because limiting public security issuances to twelve months intervals could work to significantly delay loss payments to Association policyholders who incurred an early season storm in a year following a significant late season storm. Thus, on January 1 of each year an additional amount of funding is authorized.

The Insurance Code §2210.071 provides that if an occurrence or series of occurrences in a catastrophe area results in insured losses and operating expenses of the Association in excess of premium and other revenue of the Association, the excess losses and operating expenses shall be paid as provided by the Insurance Code Chapter 2210, Subchapter B-1. The Insurance Code Chapter 2210, Subchapter B-1 does not specifically limit funding to the year in which the catastrophic event occurred. Rather, the only limitation is the "per year" amount of public securities that may be issued to fund the losses. Thus, funding, in class order as available, may be accessed to cover losses incurred in a prior year so long as the basic condition of a "catastrophic event" persists.

However, using funds authorized for a subsequent year has certain limitations. Some sources of funding under §§2210.072 - 2210.074 may not be available to the Association annually based on market conditions. Further, use of current year authorized public securities to essentially fund continuing losses from a prior year would significantly reduce or eliminate those remaining funding resources in the current year. Thus, the Legislature may determine that an alternative funding structure is necessary if losses exceed $2.5 billion or those lesser amounts that can be reasonably borrowed based on market conditions.

Sections 5.4161, 5.4162, and 5.4164. A commenter suggested as a means of simplifying the process and reducing costs that the rule allow member insurers the option of paying their proportionate share of any loss in lieu of annually participating in the payment of the public security obligation. Thus, the members would not participate in the public security obligation.

Agency Response. The Department considers the suggestion that an insurer may elect to pay their proportionate share of any loss in a lump sum assessment in lieu of continuing to participate in the payment of the public security obligation under the Insurance Code §§2210.074, 2210.609, 2210.613, and 2210.6135 to be inconsistent with the Insurance Code Chapter 2210 or the adopted rules implementing the Insurance Code Chapter 2210. Therefore, no changes have been made based on this comment.

The Insurance Code §2210.613(a) provides that 30 percent of the cost of public securities issued under the Insurance Code §2210.073 shall be paid from member assessments. The Insurance Code §2210.074(b) provides that if losses are paid with class 3 public securities, the class 3 public securities will be repaid in the manner described by the Insurance Code Chapter 2210, Subchapter M, through assessments as provided by §2210.074. Under both the Insurance Code §2210.613(a) and §2210.074(b), the Association shall notify each member of its assessment and that the proportion of losses allocable to each insurer shall be determined in the manner used to determine the insurer's participation in the Association under the Insurance Code §2210.052. The Insurance Code §2210.6135, which is in Subchapter M, has the same provisions related to notice and allocation as the Insurance Code §2210.074(b), and provides that the class 3 public securities would be paid through member assessments. The Insurance Code §2210.6135, however, further authorizes the Association to assess members up to $500 million per year.

The Insurance Code §§2210.074, 2210.613, and 2210.6135 indicate that the entire membership of the Association, and thus the Texas property insurance market, will be obligated for the repayment of the public securities. The commenter's suggestion would establish two groups with one being obligated to repay the public securities and one not being so obligated. This could limit that public security funding resource to the financial strength of the obligated participating insurers and the potential that those insurers will continue to write in Texas until the public securities are repaid. This could limit the ability of the TPFA to issue class 3 public securities.

Sections 5.4161, 5.4162, and 5.4164. A commenter suggests as a means of simplifying the process and reducing costs that, following the issuance of public securities, the rule allow member insurers the option of paying their proportionate share of any outstanding public security obligation in a lump sum assessment in lieu of annually participating in the payment of the public security obligation.

Agency Response. The Department considers the suggestion that an insurer may elect to pay their proportionate share of any outstanding public security obligation in a lump sum assessment in lieu of continuing to participate in the payment of the public security obligation under the Insurance Code §§2210.074, 2210.609, 2210.613, and 2210.6135 to be inconsistent with the Insurance Code Chapter 2210 or the adopted rules implementing the Insurance Code Chapter 2210. Therefore, no changes have been made based on this comment.

The Insurance Code §§2210.074, 2210.609, 2210.613, and 2210.6135 do not specifically provide that a member insurer may elect to prepay its class 2 or class 3 public security obligation. Rather the Insurance Code §2210.609 directs the TPFA to determine the amount of revenue that is required to fund the public security obligation for the current year. The Insurance Code §2210.613 and §2210.6135 establish the sources of the revenue that will be used to fund that obligation. The Insurance

Code §§2210.074, 2210.613, and 2210.6135 provide that each insurer shall pay an assessment equal to its proportionate share of the amount due as determined under the Insurance Code §2210.052. Each member insurer is thus liable for an undivided share of the obligation until the obligation is paid in its entirety. Additionally, prepayment may not result in a reduced annual obligation, but rather simply spread the annual obligation amount over the remaining members.

However, §5.4145 and §5.4147 of this division (relating to Excess Class 2 Member Assessment Revenue and Excess Class 3 Member Assessment Revenue) provide that excess amounts may be used to pay class 2 public security obligations payable in the subsequent year, offsetting the amount of the member assessment that otherwise would be required to be levied for that year under the Insurance Code Chapter 2210, Subchapter M. It is thus conceivable that an insurer could voluntarily overpay its current assessment obligation with an estimated payment of its subsequent year assessment, if such an arrangement was agreeable to the Association. The over payment however, would only work as an offset to the insurers actual assessment in the subsequent year.

Prepayment of the obligation is also not consistent with adopted procedures that will create annual adjustments to the participation percentage to incentivize increased writings in the catastrophe area and account for members entering and leaving the Texas insurance market under the Insurance Code §§2210.009, 2210.052, and 2210.053.

Section 5.4162. A commenter suggested that allowing the participation percentage to adjust annually, rather than being established in the year of the occurrence of the catastrophic event, would allow for consistency between the insurers Association loss obligations and statutory accounting.

Agency Response. The Department agrees that fixing the amount of an insurer's obligation to the Association in the year the catastrophic event occurred could simplify accounting for the insurer's loss obligation. However, as addressed in other responses to comments concerning this section, the insurer's loss obligation is not "fixed" as to the insurer, but is an obligation of the member insurers to satisfy over the term of the public securities. Basing the insurer's responsibility for the public security obligation on just those insurers participating in the year of the catastrophic event does not limit potential changes in the obligation. This is because of the potential for members to withdraw from the Texas market. Thus, under the commenter's proposed methodology or the adopted methodology, the amount of each insurer's total liability for the public securities liability is initially an estimate and will not become known with certainty until all of the public securities are retired. No changes have been made in response to this comment.

General. A commenter suggested that given the estimated costs of compliance with §§5.4171 - 5.4173 and 5.4181 - 5.4192 the Commissioner consider other alternatives to accomplish the statutory requirements.

Agency Response. The Department recognizes that insurers do not rate coverage or allocate premium for some lines of property and casualty insurance based on the location of an insured's operation. Further, even those insurers that write property lines in addition to other lines may not have systems that can readily identify and communicate this type of information internally because it was unnecessary prior to the enactment of HB 4409. Thus, allocating such previously unallocated premium to the catastrophe area will require insurers writing such lines to incur significant costs in upgrading their systems and information gathering requirements.

The Insurance Code §2210.613(c), however, requires that the premium surcharge apply to all policies that provide coverage on any premises, locations, operations, or property located in the catastrophe area for all property and casualty lines of insurance, other than the four listed exceptions. Thus the option is either to allocate the premium to the catastrophe area or surcharge the total premium of any policy meeting those qualifications.

An apparent intent of HB 4409 in reducing the Association's reliance on statewide assessments was to shift greater responsibility for Association losses to the catastrophe area. A premium surcharge of the total policy premium, while affecting property and operations in the catastrophe area, would also spread the Association's costs throughout the state. This spreading would be unequal, however, as it would only affect persons with property or operations in the catastrophe area. Further, the amount of the surcharge would be unrelated to the actual exposure in the catastrophe area versus the remainder of the state. This could result in commercial operations choosing not to do business in the catastrophe area. Thus, a premium surcharge on the total premium would be inconsistent with the intent of HB 4409 and could adversely impact the economy of the catastrophe area, and thus the state, which is inconsistent with the purpose of the Insurance Code Chapter 2210, as described in §2210.001.

Therefore, the remaining option is to develop procedures to allocate the premium to the catastrophe area so that the premium surcharge may be assessed in compliance with the Insurance Code §2210.613. Several means of reducing the expense of implementing this requirement have been addressed in this adoption. Additionally, the Legislature may reconsider the premium surcharge and allocation based on the cost factors outlined in the proposal, which is expected to range from several hundred thousand dollars to several million dollars per insurer or insurer group.

Section 5.4171 and §5.4192. Several commenters stated that the time periods for implementing these sections should be extended based on the various changes and procedures that will be required.

Agency Response. The Department agrees that insurers will need adequate time to implement these sections. Therefore, §5.4171(d) has been added to read: "For all lines of insurance subject to §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) this section, §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division are effective June 1, 2011." Additionally, §5.4171(e) has been added to read: "For all other lines, this section, §§5.4172, 5.4173, and 5.4181 - 5.4192 of this division are effective October 1, 2011." The requirement in §5.4192(b) has been revised to provide as follows: (1) for policies subject to §5.4182, compliance is required for all policies in force on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011.

Section 5.4171. Several commenters argued that the Legislature did not intend to include surety contracts within the scope of the Insurance Code §2210.613 and that the proposed text should be amended to clarify that surety contracts were not subject to premium surcharge within the scope of §5.4171.

Agency Response. The Department agrees with the comment and has changed §5.4171(b) to specifically exclude surety from

the scope of §§5.4171 - 5.4173 and 5.4181 - 5.4192. In reaching this conclusion the Department considers the context of the language in the Insurance Code §2210.613 and the decision in *Great American Insurance V. North Austin Municipal Utility District No. 1,* 908 S.W.2d 415 (Tex. 1995).

The *Great American* decision provides that under Texas law, insurance and surety are legally distinct. This differs from other states such as Florida which statutorily defines an insurer as "every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity" (Florida Statutes §604.03 cited in *Snow v. Jim Rathman Chevrolet, Inc.,* 39 So.3d 368 (Fla.App. 5 Dist. 2010)). The Department does not take the position that the failure to reference terms related to surety contracts excludes those contracts from the application of a particular statute.

Thus, the Department looks to the specific terms used and the context of their usage. The Insurance Code §2210.613(c) provides that the premium surcharge applies to all "policies" described in §2210.613(b) that provide "coverage" for all "property and casualty lines of insurance." The Insurance Code §2210.613(b) provides that each "insurer," the Association and the Texas FAIR Plan Association shall assess a premium surcharge to its policyholders. Further, the term "insurer" is defined for use in the Insurance Code Chapter 2210, Subchapter M, under §2210.602(6) as "each property and casualty insurer authorized to engage in the business of property and casualty insurance in this state and an affiliate of such an insurer, as described by §823.003, including an affiliate of that is not authorized to engage in the business of property and casualty insurance in this state." The use of the terms "insurer," "policyholders," "policies," "coverage," and "property and casualty lines of insurance" in these contexts indicate that the Legislature was addressing insurance contracts only rather than taking a more expansive view of applying the premium surcharge to both insurance and surety contracts.

Section 5.4171. Several commenters argued that application of the premium surcharge was unworkable with respect to surety contracts, and thus the sections should explicitly exclude surety contracts.

Agency Response. The Department disagrees with this argument. The person purchasing the surety contract could pay the premium surcharge just as easily as a person purchasing an insurance contract may pay the premium surcharge. Further discussion of this issue is unnecessary because the Department has determined that the Insurance Code §2210.613 premium surcharge does not apply to surety contracts.

Section 5.4172(6). A commenter stated that the inclusion of the term "resides in" in the definition of "operations" causes confusion with regard to commercial coverages and should be deleted from the definition. The commenter argued that location of a business owner or board member's residence should have no effect on the premium or premium surcharge related to a commercial policy.

Agency Response. The Department agrees with the commenter. The intent of using the term "resides in" was to require insurers to surcharge personal automobile policies only if the insured resided in the catastrophe area, notwithstanding whether the insured regularly drives to, within, or through the catastrophe area. The alternative reading based on the location of a business owner or board member's residence was unintended. To reduce this potential for confusion, the Department has removed the term "resides in" from §5.4172(6) and amended the definition to include automobiles located in the catastrophe area. Further, to be consistent with the terminology, references in §5.4172(4) and §5.4182(a)(1) have been conformed to refer to the term "automobile" or "auto," rather than motor vehicle. These changes will have no effect on any decision to surcharge automobile policies, because §5.4182(a)(1) provides that the surcharge is based on the location where the automobiles are principally garaged.

Section 5.4182. A commenter questions the necessity of §5.4182(b) and (c) and suggests that sufficient instruction is given in §5.4183 to allocate premium to the catastrophe area based on the proportion the exposure in the catastrophe area bears to the total exposure on the policy.

Agency Response. The Department disagrees that §5.4182(b) and (c) are unnecessary. Section 5.4182 specifically lists the lines of insurance where a direct method of determining the surcharge is required. The lines of insurance listed in §5.4182 are lines where insurers know, or should know, the geographic location of their risks. Section 5.4183 refers to other lines not included within the scope of §5.4182.

Section 5.4182 and §5.4183. A commenter states that the term "operations" in the Insurance Code §2210.613(c) is vague and ambiguous and will lead to confusion for insurers who have to determine how to apply the statute and rule's surcharge provisions. The commenter brought up examples of directors' and officers' liability insurance, general liability insurance, which may not be tied to specific locations, as well as commercial automobile liability insurance which may provide coverage for vehicles traveling through the catastrophe area on a regular basis.

Agency Response. The Department agrees that the Insurance Code §2210.613(c) does not define the term "operations," and agrees it is challenging to determine the proportion of operations attributable to the catastrophe area for some lines of insurance, such as D&O, and general liability, where the premium is not determined based on the geographic location of the insured's operations. In response to this comment §5.4183 has been changed.

Section 5.4173(6) defines the term "operations" as "[a] person's interest in property, or activities, that may result in, or give rise to, a loss that is insurable under a property or casualty insurance policy, including the use of an automobile; ownership, lease, or occupancy of a residence or other real property; and activities performed by a person in connection with the manufacture, distribution, or sale of goods or services. A person is considered to have operations in the catastrophe area if the person maintains an automobile or a physical location in the catastrophe area, regardless of whether that location is owned, leased, rented, or occupied by the person."

Therefore, an insured is not considered to have "operations" in the catastrophe area unless the insured maintains an automobile or a physical location within the catastrophe area. So, for example, a commercial automobile insured that traveled intermittently through the catastrophe area but did not maintain a business location in the catastrophe area where operations are performed, would not be subject to premium surcharge. Section 5.4183 has been changed to provide for the use of the allocation percentage indicated by the insured's commercial property insurance premium in cases where the insurer also provides commercial property insurance to the insured. Since the insurer is already required to determine the percentage of premium attributed to the catastrophe area for its insured's commercial property policy, this information should be available to the insurer. In the case

where the insurer does not provide commercial property insurance to the insured, the percentage of premium attributable to the catastrophe area shall be determined by the insurer from information provided by the insured. Further, as a means to reduce potential confrontation in implementing this section, insurers are not required to verify or otherwise determine the reasonableness of the allocation percentage provided by the insured.

Section 5.4183. A commenter suggested that §5.4183 should provide an exhaustive list of insurance lines subject to the premium surcharge or specify which insurance lines are not included.

Agency Response. The Department agrees that the rule should specify that lines of insurance not included in §5.4182 are addressed in §5.4183. Therefore, §5.4183 has been changed to specify that it applies to all other applicable lines of insurance not specified in §5.4182. Thus, §5.4183 does not apply to those lines listed in §5.4182, nor does it apply to lines, insurers, premiums, or policies excluded under §5.4171(b) and (c). In considering this comment the Department also examined §5.4181 and determined that certain nonsubstaintive grammatical changes were necessary to §5.4181(a)(2). Specifically, the Department separated the references to premium tax, surplus lines premium tax, and independently procured premium tax by semicolons and changed the reference "surplus lines premium taxes" to "surplus lines premium tax."

Section 5.4183. As a means to avoid confusion and uncertainty for businesses that have premises, operations, or insured property located both in and outside the catastrophe area, several commenters recommend that if a premium surcharge percentage and catastrophe area premium percentage can be established for the insured's property coverage, then the premium allocations for other lines should default to the allocation percentage of the insured's property coverage. The commenters' proposals differed in degree of complexity and terminology.

Agency Response. The Department concurs in this concept. Thus, §5.4183 has been changed to provide for the use of the allocation percentage indicated by the insured's commercial property insurance premium in cases where the insurer provides commercial property insurance to the insured in addition to other lines. As discussed in response to prior comments, property in the catastrophe area is a significant factor indicating "operations" in the catastrophe area. Since the insurer is already required to determine the percentage of premium attributed to the catastrophe area for its insured's commercial property policy, this information should be available to the insurer. In cases where the insurer also provides commercial property insurance to the insured and the insurer cannot reasonably determine or allocate premium to the catastrophe area, the insurer will determine the catastrophe area allocation percentage as the ratio of the commercial property premium attributable to the catastrophe area divided by the total Texas premium of the commercial property policy. The insurer will then apply this allocation percentage to the insured's Texas premium for lines of insurance covered under §5.4183.

As revised, §5.4183 also provides that in the case where the insurer does not provide commercial property insurance to the insured, the percentage of premium attributable to the catastrophe area shall be determined by the insurer from information provided by its insured. Insurers are not required to verify or otherwise determine the reasonableness of the allocation percentage provided by the insured. Therefore, in the case where the insurer also writes the insured's commercial property, there should be no dispute as to the allocation. In the case where the insurer does not write the insured's commercial property, the insurer may rely on information provided by the insured, so there should be no reason for a dispute.

The adopted allocation methodology provides a reasonable means to implement the Insurance Code §2210.613 at this time. If necessary, the adopted allocation methodology in §5.4182 and §5.4183 may be refined in the future based on experience. The changes to the allocation methodology set forth in §5.4183 requires conforming changes to the proposed text in §§5.4184(d), 5.4184(f), 5.4187(a), 5.4189, 5.4190(e), and 5.4192(b).

Section 5.4183. A commenter states that they have serious concerns with the allocation methodology, especially as it applies to the commercial policies that are not physically located in the hurricane zone. The commenter stated that there was no provision in the rule that speaks to what is to be done if the insurer and the insured disagree on the amount of property located in catastrophe area, and that is a problem. The commenter believed the proposed system could lead to insured fraud and could lead to a completely unreliable and unpredictable revenue stream for class 2 public securities, which the commenter thought would lead to concerns regarding the marketability of the bonds.

Agency Response. As previously stated in these responses, the Department agrees that it is challenging to determine the proportion of operations attributable to the catastrophe area for some lines of insurance. The Department considered in its proposal several means of trying to alleviate the potential for allocation disputes between the insurer and the insured, including a notice procedure and a default percentage. As previously discussed in these responses to comments, the provisions establishing a procedure for handling disagreements between the insurer and the insured have been removed. Rather, in the case where the insurer also writes the insured's commercial property, there should be no dispute as to the allocation. In the case where the insurer does not write the insured's commercial property, the insurer may rely on information provided by the insured.

The Department is aware that some insureds, or insurers on the insured's behalf, might seek to underestimate the amount of premium attributable to the catastrophe area as a means to avoid paying their "full" surcharge. Seeking to reach a perfect allocation, however, is an impractical solution to this problem and would only result in requiring insurers and insureds alike to incur significant additional costs. It is in this attempt to balance imposing significant additional costs on insurers and insureds versus the amount of the surcharge for reporting insureds that the Department has revised the §5.4183 allocation scheme to be based, if possible, on catastrophe area property coverage as discussed in prior comments.

The Department however, will continue to monitor the situation. If insurers or insureds are uncooperative in their participation and compliance, the Department may revisit this allocation methodology and take appropriate remedial action.

Finally, the Department disagrees that such activity could lead to a completely unreliable and unpredictable revenue stream which may result in problems when marketing the public securities. The Department consulted with the TPFA regarding this question and was informed that such a result was unlikely. First, the premium surcharge will be based on the reported premium in the catastrophe area as required in the Insurance Code §2210.613. If premium is underreported, the result would be a greater per-

centage premium surcharge and not an unpredictable revenue stream. Second, to the extent that such reporting did raise a concern, the lenders would require an additional contractual coverage requirement (an amount required to be collected annually in excess of the principal, interest and expenses due on the public securities) to cover any uncertainty in the revenue stream. To the extent that an additional contractual coverage amount was required, any excess class 2 premium surcharge revenue would be distributed annually as provided in the Insurance Code §2210.611. Thus, marketability of the bonds would not be endangered.

Section 5.4183. A commenter suggests that there are some constitutional problems with increasing the default allocation percentages three percent per year.

Agency Response. The Department does not agree with the suggestion; however, as discussed in prior comments, the allocation method discussed in the comment has been removed from the text and therefore further discussion is unnecessary.

Section 5.4183. A commenter recommends the insured's appeal option be removed from the rule because allowing the insured an opportunity to object to the allocation methodology will require a burdensome, manual process to implement and to respond to objections.

Agency Response. As previously discussed in these responses to comments, §5.4183 has been changed. The premium surcharge will be based on the insured's allocated property premium, or if such information is unavailable, the information provided by the insured. Therefore, because the information is provided by the insured, the requirements concerning an objection by the insured have been removed.

Section 5.4184(b). Several commenters suggest that the requirement in §5.4184(b) be amended to not require an additional premium surcharge upon reinstatement or reissuance of a policy, such as is authorized in the Insurance Code §551.106.

Agency Response. The Department agrees with the suggestion and has changed §5.4184(b) but has adopted the term "reinstated" for use in this section, rather than "reissued." The Department considers a policy to be "reinstated" if it covers the same period as the original policy without a lapse in coverage, except as provided in the Insurance Code §551.106. In this context, policies that do not meet this definition of reinstated, regardless of what the practice is called, are subject to an additional surcharge.

Section 5.4184(c) and (d). Several commenters asked for clarification concerning the meaning of §5.4184(c) as it relates to "all transactions on a policy occurring within a seven day period."

Agency Response. The purpose of the language in §5.4184(c) regarding "all transactions on a policy occurring within a seven day period" is to recognize that multiple related transactions on a policy may occur over the course of several days. The purpose is to allow insurers to combine the premium effect of all policy transactions over a short period of time to determine the amount of any additional premium that may apply to the policy. For example, an insured may add a new vehicle to a policy and several days later delete an old vehicle. The purpose is to allow insurers to "net out" these transactions before determining if an additional premium surcharge is required. The Department is aware that this may result in additional programming and systems costs to insurers, however, it should also reduce conflicts between insurers and insureds related to the order transactions are completed and concepts of continuous coverage.

§5.4184(c) and (d). A commenter recommended that a "fixed dollar amount threshold" mechanism be substituted for the "seven day" trigger mechanism for mid-term policy changes to eliminate unnecessarily "de minimus" mid-term premium increase resulting in additional premium surcharges.

Agency Response. The Texas Insurance Code §2210.613 requires the premium surcharge on the policy premium. The rule requires a premium surcharge be applied to any additional premium. If this provision were not included, insureds could attempt to reduce their surcharge by purchasing minimal coverage initially and then immediately adding additional coverage to that policy. As for the amount of the additional premium and the premium surcharge, many insurers already have rules in place that waive additional or return premiums for what may be considered "de minimus" amounts. Thus, the insurer has already determined that any additional (or return) premium is above a "de minimus" amount. For additional premiums, the insurer has determined it is worth the cost of collecting the additional premium, as such, an additional surcharge should also be collected in these cases.

Section 5.4184(e) and (f). Several commenters assert that §5.4184(f) is inconsistent with the statutory provisions providing that the premium surcharge is nonrefundable because it allows a refund of a premium surcharge based on a preliminary deposit premium if "after exposure or premium audit, retrospective rating adjustment, or other similar adjustment after policy expiration, the deposit premium exceeds the actual premium . . . ". The commenters also noted that the rule allowed for a refund of the premium surcharge under §5.4184(f) but not for a mid-term policy change under §5.4184(e).

Agency Response. The Department disagrees with the assertion and considers the section to be consistent with the statute. In the case of a policy subject to audit or retrospective rating adjustments, the premium paid at policy inception is merely a "deposit premium" and not the "policy premium." In this case there is the expectation of the insurer and insured that the "policy premium" will be determined after retrospective rating adjustments or audit adjustments. This differs from a mid-term adjustment to the policy premium, because there was no expectation that the premium paid at the policy inception would later be adjusted and the actual premium would be determined after the policy expired. Thus, no changes have been made in response to this comment.

Section 5.4184(f). A commenter asserts that §5.4184(f), will require insurers to incur additional costs to develop software, systems and procedures necessary to identify and determine audited policies, cancelation return premium, and mid-term change return premium that would not be subject to surcharge premium.

Agency Response. The Department disagrees with the commenter's assertion because §5.4184(f) only applies to an audit adjustment that results from an audit after the policy expires. Thus, §5.4184(f) should not result in new costs to the insurer based on determining cancelation return premium and mid-term change return premium.

Section 5.4186(a). Several commenters recommend that the rule be revised to designate the Surplus Lines Stamping Office of Texas (SLSOT) as the primary source of collection and reporting surplus lines information required under §5.4186. A commenter points out that SLSOT currently collects data related to surplus lines transactions and that the information required to be

reported under these sections could be piggybacked on to that reporting process.

Agency Response. Such an action would require amending the SLSOT's plan of operation, which was not contemplated in the proposal or evaluated for cost. The Department will continue to receive information related to whether the SLSOT should be required to collect the information related to surplus lines insurers. The section was not changed in response to this comment.

Section 5.4186(a). A commenter recommends that the rule be changed to state that the responsibility for reporting and surcharges may not be shifted to the surplus lines agent by contract. The commenter proposes the following language: "[A]n affiliated surplus lines insurer may not delegate to a surplus lines agent any duty of the insurer under these Rules, except as otherwise authorized by Chapter 981, Insurance Code, or these Rules."

Agency Response. The Department disagrees that the suggested change is necessary at this time. Section 5.4186(a) already makes clear that surplus lines insurers will ultimately be held responsible for the failure of its agents to comply with these rules. Additional language stating what may and may not be placed in a contract between an insured and its agent as a result of these rules is not necessary.

Section 5.4186(b). Several commenters argue that the insurers and surplus lines agents should be given additional time to remit surcharges under §5.4186(b). One commenter suggested the deadline should be extended to 30 or 45 days after the end of the month. Another commenter suggested that the deadline for surplus lines agents should be extended to 60 days after the end of the month.

Agency Response. The Department agrees that the deadline should be extended to provide insurers, including surplus lines agents allowed by affiliated surplus lines insurers to remit the surcharges on their behalf, additional time to remit surcharges to the Association. Therefore §5.4186(b) has been changed to provide insurers and surplus lines agents until the end of the following month to remit surcharges to the Association.

Section 5.4189. A commenter suggests that the proposed notice required under §5.4189 is not consumer friendly and should be revised.

Agency Response. The Department has revised the notice based in part on suggested language from the commenter. The bracketed area of the revised notice allows the insurer the option of including the amount of the surcharge, as required by §5.4189(b), either in this notice or a separate document.

Section 5.4189. A commenter requests that §5.4189 be amended so that insurers are not required to provide notice to "applicants" and that notification must only be provided on the issuance or renewal of a policy.

Agency Response. The Department agrees that it is not necessary to require the notice to applicants and that the notice must be provided only upon policy issuance. The policy is purchased and priced for its intended term. The premium surcharge is a statutory requirement in addition to the price of the policy. Further, the additional information required under proposed §5.4189(c) has been deleted because, as provided in the changes to §5.4183, the method of determining the allocation percentage will either be determined by the insured based on their commercial property policy, or based on information provided by the insured. This makes the requirement that insurers notify their insureds of their right to dispute the allocation percentage unnecessary.

Section 5.4189(c). A commenter recommends that §5.4189 be revised to triple the time periods for satisfying the surcharge notice requirement when a policy is provided by a surplus lines agent.

Agency Response. The Department agrees that the proposed 10-day time period may have been too aggressive for all situations. Therefore, §5.4189(d) has been amended to give insurers 20 days after a mid-term change before an additional notice is required. The time period remains the same for all insurers and surplus lines insurers.

Section 5.4190. Several commenters suggest that the §5.4190 requirement for insurers to report surcharge collections may present implementation challenges because some insurers do not reconcile against amounts actually collected from insureds but instead track and reconcile to billed surcharges. The commenters request that the section allow sufficient time for implementation.

Agency Response. The Department agrees that insurers will require time to program and implement this requirement. As provided in the changes to §5.4171, this section shall not become effective until June 1, 2011, for all lines of insurance subject to §5.4182 of this division and October 1, 2011 for all other lines subject to §§5.4171 - 5.4173 and 5.4181 - 5.4192 of this division. Additionally, §5.4190 has been changed to require the report 90 days after the end of calendar year.

Section 5.4190(b). A commenter suggests that the 60-day period for filing the report required under §5.4190(b) is unworkable because surcharges are collected based on the effective date of policies written in the surcharge period, thus making it possible (and likely) that surcharge collection will continue long after the end of the calendar year.

Agency Response. The Department disagrees that surcharges will be routinely collected long after the end of the calendar year. As provided in §5.4185(b), insurers must apply money received from the insured to the premium surcharge prior to applying funds to premium or any other obligations. Section 5.4185(b)(1) clarifies this requirement by prohibiting insurers from allocating pro-rata or otherwise mixing premium surcharges with premium over installment plan payments. Thus, except for possible additional surcharges due to mid-term policy changes, insurers will not collect surcharges over the life of the policy, but rather upon policy inception. Mid-term policy changes, and adjustments for policies based on premium audits or retrospective rating occurring in a subsequent year would be reported on the subsequent year's annual report. As to the proposed 60-day period, §5.4190 has been changed to require the report 90 days after the end of the calendar year.

Section 5.4190(c). A commenter assumes that the SLSOT would make the report required under §5.4190 on behalf of affiliated surplus lines insurers when possible.

Agency Response. The Department disagrees that §5.4190 establishes such a reporting requirement. Section 5.4190 does not require SLSOT to make any changes to its reporting system or report on behalf of affiliated surplus lines insurers. However, §5.4190 does not prohibit SLSOT from reporting on behalf of surplus lines insurers if SLSOT and the insurer agree to such an arrangement.

Section 5.4190(e). A commenter asks that the purpose of the distinction between surcharges determined under subparagraphs (A), (B), and (C) of §5.4190(e)(4) be clarified. The commenter suggests that it seems sufficient to provide the allocation of total premium to the catastrophe area and of total premium outside the catastrophe area. Further, requiring additional layers of reporting is not necessary under HB 4409 and will vastly increase the cost and time needed to enhance insurer computer systems.

Agency Response. The Department agrees that §5.4190 can be simplified by combining §5.4190(e)(4)(A) - (C) under subparagraph (A) and redesignation of subparagraph (D) as subparagraph (B).

Section 5.4190 and §5.4191. A commenter notes that because the annual premium surcharge report and annual premium surcharge reconciliation report ask for premium written in the calendar year, as well as premium surcharges collected in the calendar year, these figures are never going to reconcile because written premium is different from collected premium. For example, if a company writes a policy in December the company would report the full annual premium as written premium. But if the premium were billed on an installment basis, the company would only be allowed to collect surcharge on the first installment of premium.

Agency Response. The Department agrees that in some instances there may be mismatches between calendar year written premium and surcharges collected for the same period of time. However, the reports provide useful information for the Department and Association concerning the collection of premium surcharges. The Department does not consider it necessary at this time for insurers to incur additional costs to enhance the reconciliation of these reports.

The Department disagrees with the statement in the example that under an installment plan only one month of the surcharge would have been collected. As previously discussed, §5.4185(b) requires insurers to apply money received from the insured to the premium surcharge prior to applying funds to premium or any other obligations. Section 5.4185(b)(1) clarifies this requirement by prohibiting insurers from allocating pro-rata or otherwise mixing premium surcharges with premium over installment plan payments.

Section 5.4190 and §5.4191. A commenter argues that there is no apparent reason for requiring information by line under §5.4191, but requiring it by line adds a huge cost for each insurer trying to comply with this regulation. The annual premium surcharge report requires insurers to report collected premium surcharges by line of business and requires insurers to provide information at the policy and risk level, including any alternative allocation percentages used, which represents a significant issue, since any alternative method will be a manual calculation resulting only in a surcharge amount being booked.

Agency Response. The Department disagrees that the requirement that insurers report by line of business requires insurers to provide information at the policy and risk level. However, the Department agrees that it is not necessary at this time to collect this data by line of business. As such §5.4190 and §5.4191 have been changed to remove the requirement that these reports be provided by line of business.

Section 5.4192. A commenter suggests that implementing the requirements in §5.4192 will take a significant amount of time and suggests that the proposed October 1, 2010 effective date under §5.4192 be postponed until March 1, 2011.

Agency Response. As previously discussed in the responses to comments, the Department agrees that implementation of the §5.4192 will involve a significant amount of time. Therefore the implementation date for this section has been established as follows: (1) for policies subject to §5.4182, compliance is required for all policies *in force* on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011.

Section 5.4192. A commenter suggests that §5.4192 should be revised to require that the Department initially obtain the information required from affiliated surplus lines insurers through the stamping office, and that the stamping office amend its procedures to facilitate such collection, maintenance, and reporting of information.

Agency Response: The Department declines to make the suggested change. Section §5.4192(c) states the Department's intent to utilize SLSOT as a resource when it is possible and practical. The described change, however, would require the Department to amend SLSOT's plan of operation, which was not contemplated in the proposed rules or evaluated for costs. The Department will continue to receive information related to whether the SLSOT is best to collect the information related to surplus lines insurers. Therefore, the Department has not made any changes in response to this comment.

Section 5.4192. A commenter requests confirmation that §5.4192(a) - (c) establishes that the duty of collecting, maintaining and reporting the required information is on the insurer and that the proposed rules impose no similar or related duty on surplus lines agents.

Agency Response. Section 5.4192(a) - (c) establishes the requirements set forth in that section. It is not intended that this section require a surplus lines agent to assume the duties of a surplus lines insurer.

Section 5.4192. A commenter requests confirmation that the §5.4192(b) requirement that each insurer shall collect, maintain, and report sufficient data records . . . "[f]or policies with effective dates on or after October 1, 2010 . . ." means that the data collection, maintenance and reporting duties are to be performed by insurers on a "go forward" basis beginning on October 1; and apply to policies with an "inception date" or "renewal date" on or after October 1, and not those policies merely in force on that date.

Agency Response. Section 5.4192(b) has been changed to modify the reporting requirement and provide an extension for insurers using the allocation methodology established in §5.4183. Proposed §5.4192(b) established the requirement for all policies with effective dates on or after October 1, 2010. This requirement in §5.4192(b) has been revised to provide as follows: (1) for policies subject to §5.4182, compliance is required for all policies *in force* on or after October 1, 2011; and (2) for policies subject to §5.4183, compliance is required for all policies effective on or after October 1, 2011.

The change is necessary because it is possible that there may be a catastrophic event in 2011. The TPFA will need reliable catastrophe area premium information to secure the issuance of any public securities that may be issued under the Insurance Code §2210.073. Additionally, if a surcharge is needed, the Commissioner and the Association must be able to obtain reliable catas-

trophe area premium information in a timely manner in order to determine any necessary premium surcharge percentage. Further, it is anticipated that the lines of insurance subject to §5.4182 will make up the bulk of the catastrophe area premium.

As previously discussed, for lines of insurance subject to §5.4182, insurers already know, or should already know, the geographic location of these risks. In addition, for residential and commercial property lines of insurance, insurers should know premiums attributable to risks located in the catastrophe area.

The Department recognizes that for lines of insurance other than residential and commercial property, insurers may not know whether a Harris County insured is located within those portions of Harris County designated as a catastrophe area. The Department believes the October 1, 2011 date provides sufficient time for insurers to make this determination for policies in force on that date.

For lines of insurance subject to §5.4183, insurers may not know the geographic location of their insureds. Thus, the requirement for compliance with §5.4192 is extended to apply to those policies effective on or after October 1, 2011.

NAMES OF THOSE COMMENTING AGAINST THE SECTIONS.

Against, with changes: American Insurance Association; Association of Fire and Casualty Companies of Texas; Casey, Gentz & Magness, L.L.P.; Insurance Council of Texas; Liberty Mutual Insurance Company; Office of Public Insurance Counsel; Property and Casualty Insurers of America; Surplus Lines Stamping Office of Texas; Texas Surplus Lines Association, Inc.; The Surety and Fidelity Association of America; and Travelers.

STATUTORY AUTHORITY. The sections are adopted under the Insurance Code §§2210.008, 2210.052, 2210.053, 2210.071, 2210.072, 2210.073, 2210.074, 2210.151, 2210.152, 2210.609, 2210.613, 2210.6135, and 36.001. Section 2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code.

The Insurance Code §2210.052(a) requires that a member company share in the losses and expenses of the Association based on the proportion that the net direct premiums of that member during the preceding calendar year bears to the aggregate net direct premiums by all members of the Association. Under the Insurance Code §2210.052(c), a member company's share of the losses and expenses of the Association is required to be determined annually and in the manner provided by the plan of operation. In the determination of a member company's share of the losses and expenses of the Association, the Insurance Code §2210.052(d) specifies that members are entitled to a credit for insurance voluntarily written in the catastrophe areas. The Insurance Code §2210.052(d) also requires that the method for calculating the credit be contained in the plan of operation.

Section 2210.052(e) provides an exemption from participation in any insured losses and operating expenses of the Association in excess of premium and other revenue of the Association until the second anniversary of the date on which the insurer first becomes a member of the Association for an insurer that becomes a member of the Association and that has not previously been a member of the Association. The Insurance Code §2210.053(b) provides the Department may develop a program designed to create incentives for insurers to write voluntary windstorm and hail insurance in the catastrophe areas.

Section 2210.071(a) provides that if an occurrence or series of occurrences in a catastrophe area results in insured losses and operating expenses of the Association in excess of premium and other revenue of the Association, the excess losses and operating expenses shall be paid as provided by Subchapter B-1, Chapter 2210, Insurance Code. Section 2210.072(a) provides that losses not paid under the Insurance Code §2210.071 shall be paid as provided by §2210.072 from the proceeds from class 1 public securities. Section 2210.072(b) authorizes class 1 public securities to be issued in a principal amount not to exceed $1 billion per year. Section 2210.072(c) requires class 1 public securities to be repaid in the manner prescribed by Subchapter M, Chapter 2210, Insurance Code, from Association premium revenue.

Section 2210.073 provides that losses not paid under Insurance Code §2210.072 shall be paid as provided by §2210.073 from the proceeds from class 2 public securities issued in accordance with Subchapter M, Chapter 2210, Insurance Code. Section 2210.073(b) authorizes class 2 public securities to be issued in a principal amount not to exceed $1 billion per year and requires class 2 public securities to be repaid in the manner prescribed by Subchapter M, Chapter 2210, Insurance Code. Section 2210.074(a) provides that losses not paid under Insurance Code §2210.072 and §2210.073 shall be paid as provided by §2210.074 from the proceeds from class 3 public securities issued in accordance with Subchapter M, Chapter 2210, Insurance Code. Section 2210.074(b) authorizes class 3 public securities to be issued in a principal amount not to exceed $500 million per year and requires class 3 public securities to be repaid in the manner prescribed by Subchapter M, Chapter 2210, Insurance Code.

Section 2210.151 authorizes the Commissioner to adopt the Association's plan of operation to provide Texas windstorm and hail insurance coverage in the catastrophe area by rule. Section 2210.152 provides that the Association's plan of operation provide for the efficient, economical, fair, and nondiscriminatory administration of the Association and include both underwriting standards and other provisions considered necessary by the Department to implement the purposes of Chapter 2210. The Insurance Code §2210.152(a)(2)(A) requires the plan of operation to include a plan for the equitable assessment of the members of the Association to defray losses and expenses.

Section 2210.609 provides that the Association shall repay all public security obligations from available funds, and if those funds are insufficient, from revenue collected in accordance with the Insurance Code §§2210.612, 2210.613, and 2210.6135. Section 2210.609 further provides that the Association shall deposit all revenue collected under §§2210.612, 2210.613, and 2210.6135 in the public security obligation revenue fund and further provides for the payment of the public security obligations and the public security administrative expenses by irrevocably pledging revenues received from premiums, premium surcharges, and amounts on deposit in the public security obligation revenue fund, together with any public security reserve fund.

Section 2210.613 provides that the Association shall pay class 2 public securities issued under §2210.073 with premium surcharges and member assessments as provided by §2210.613. Section 2210.6135 provides that the Association shall pay class 3 public securities issued under Section §2210.074 as provided

by §2210.6135 through member assessments. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

§5.4161. Member Assessments.

(a) The Association shall determine if a member assessment is necessary to fund the Association's outstanding class 2 and class 3 public security obligations, including any required contractual coverage amount (required obligations) based upon the evaluation of information that is provided to the Association by the Texas Public Finance Authority.

(b) Pursuant to Insurance Code Chapter 2210 and the Association's plan of operation, if the Association determines that a member assessment is required to fulfill the Association's required obligations the Association shall assess the members of the Association in an amount the Association determines to be reasonable and necessary to fully provide for the Association's required obligations.

(c) This section and §§5.4162 - 5.4167 of this division (relating to Amount of Assessment; Notice of Assessment; Payment of Assessment; Failure to Pay Assessment; Contest After Payment of Assessment; and Inability to Pay Assessment by Reason of Insolvency, respectively) are a part of the Texas Windstorm Insurance Association's plan of operation and shall control over any conflicting provision in §5.4001 of this subchapter (relating to Plan of Operation).

§5.4162. Amount of Assessment.

(a) The Association shall determine which members of the Association shall participate in any assessment to provide for the Association's required obligations as determined under §5.4161 of this division (relating to Member Assessments).

(1) The Association may not include in the assessment an insurer that became a member of the Association after September 1, 2009, and had not previously been a member of the Association, until after the second anniversary of the date on which the insurer first becomes a member of the Association. The anniversary date shall be the date the insurer is authorized by the department to engage in the business of property insurance in this state.

(2) The Association shall include in the assessment an insurer described under paragraph (1) of this subsection after the second anniversary of the date on which the insurer first becomes a member of the Association without regard as to whether the catastrophic event that gave rise to the class of public securities occurred prior to the second anniversary of the date on which the insurer first became a member of the Association.

(3) The Association may not include in the assessment formula, the net direct premium of an affiliate insurer engaged in the business of surplus lines insurance as described in the Insurance Code §2210.052(c), that a federal agency or court of competent jurisdiction determines to be exempt from the assessment formula under the Insurance Code Chapter 2210.

(b) This determination shall be computed on a calendar year basis for the year in which the assessment is made. This determination shall not be based on the year in which the catastrophic event occurred, except for an assessment made during that year. Net direct premiums shall be determined as provided under §5.4001 of this subchapter (relating to Plan of Operation).

(c) The designated members of the Association shall participate in any assessment levied in the proportion that the net direct premiums of such member written in this state during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the Association as furnished to the Association by the department after review of annual statements, other reports, and required statistics; provided, however, that if at the time of such assessment the department has not furnished to the Association information necessary to compute a member's participation during the preceding calendar year, then each member's participation shall be based upon information furnished to the Association from the last calendar year in which such information is available and, upon obtaining the necessary information from the department, the Association shall reassess or refund to each member such amounts as are necessary to properly reflect such member's participation; provided, further, that a member shall be entitled to receive the following credit for insurance, similar to catastrophe insurance, written in such catastrophe areas.

(d) The Figure: 28 TAC §5.4162(d) graphically depicts the Texas Windstorm Insurance Association Procedure For Calculating Member Assessment Percentages Including Credit For Voluntary Writings. All premiums are for the most recent preceding calendar year ending December 31, as furnished by the department. Column 1(a): Statewide net direct premiums for extended coverage and other allied lines. Column 1(b): Statewide net direct premiums for extended coverage and other allied lines portion of the multiple peril line. Column 1(c): Statewide net direct premiums for homeowners and farm and ranch owners. Column 2: The sum of the statewide net direct premiums at 90% of the extended coverage and other allied lines, and 50% of the homeowners and farm and ranch owner's, or such percentage as may be determined in accordance with §5.4001(a)(2)(N)(i)(III) of this chapter (90% of Column 1(a) plus 90% of Column 1(b) plus 50% of Column 1(c)). Column 3: Each company's percentage of the net direct premiums as described in Column 2, which is the basis for indicating normal required participation in the Association prior to credits for voluntary writings in the designated areas. Column 4: Total windstorm and hail premiums in the designated areas (Association premiums plus voluntary premiums). Column 5: Normal company quota of total windstorm and hail premiums (Column 3 x Column 4). Column 6: Each company's voluntary writings in the designated areas multiplied by the same percentages as shown in Column 2. Note: Maximum credit shall be limited to company's normal quota. Column 7: Each company's maximum possible allocation after applying credits for voluntary writings (Column 5 minus Column 6). Negative allocation to be shown as zero. Column 8: Percentage participation of each member company in the Association, prior to application of offset. Note: The offset figure measures the excess premiums developed by the maximum credit in Column 6. Column 9: Percentage participation of each member company in the Association.
Figure: 28 TAC §5.4162(d)

(e) The department shall furnish to the Association the amount of net direct premiums of each member company written on property in this state and the aggregate net direct premiums written on property in this state by all member companies during the preceding calendar year as reported by member companies to the department. Within a reasonable time after the receipt of same from the department, the Association shall notify each member company, in writing, sent by certified mail, the amount of the net direct premiums written on property in this state during the preceding calendar year by the member company to whom notice is given, including the net direct premiums of similar insurance voluntarily written in the catastrophe areas, upon which such company's percentage of participation will be determined. Such notice shall state that such notification, and the content thereof, is an act, ruling, or decision of the Association and that the member company to whom such notice is given shall be entitled to appeal such act, ruling, or decision within 30 days from the date shown on the notice in accordance with the Insurance Code §2210.551. Thereafter, the Association shall determine the percentage of participation for each mem-

ber company in the manner provided in this section and shall notify each member company thereof, in writing, sent by certified mail. Such notice shall state that such notification, and the content thereof, is an act, ruling, or decision of the Association insofar as the mathematical determination of the percentage of participation is concerned and that the member company to whom such notice is given shall be entitled to appeal therefrom within 30 days from the date of such act, ruling, or decision as shown on said notice in accordance with the Insurance Code §2210.551.

(f) To assist the Association in determining each member insurer's percentage of participation as soon as possible in the calendar year, each member insurer shall furnish to the Association on or before March 1 of each year a copy of its Exhibit of Premiums and Losses (Statutory Page 14) for the State of Texas that is filed annually with the department as part of the insurer's Texas Property and Casualty Annual Statement.

§5.4167. Inability to Pay Assessment by Reason of Insolvency.

In the event a member of the Association is placed in temporary or permanent receivership under order of a court of competent jurisdiction based upon a finding of insolvency, and such member has been designated an impaired insurer by the commissioner, and in the event it is necessary to obtain additional funds to provide for operating expenses and losses in the year the insurer is declared impaired, the aggregate net amount not recovered from such insolvent insurer shall be reallocated among the remaining members of the Association in accordance with the method of determining participation as determined in the plan of operation.

§5.4171. Premium Surcharge Requirement.

(a) Following a catastrophic event, insurers may be required to assess a premium surcharge under the Insurance Code §2210.613(b) and §2210.613(c) on all policyholders with property and casualty insurance policies that provide coverage on premises, operations, or insured property located in a catastrophe area. This requirement applies to admitted insurers, the Association, the Texas FAIR Plan Association, Texas Automobile Insurance Plan Association policies, affiliated surplus lines insurers, and includes policies independently procured from affiliated insurers.

(b) This section and §§5.4172, 5.4173 and 5.4181- 5.4192 of this division (relating to Premium Surcharge Definitions, Determination of the Surcharge, Premiums to be Surcharged, Allocation Method for Specified Lines of Insurance, Allocation Method for Other Lines of Insurance, Application of the Surcharges, Premium Surcharges are Mandatory, Remittance of Premium Surcharges, Offsets, Surcharges not Subject to Commissions or Premium Taxes, Notification Requirements, Annual Premium Surcharge Report, Premium Surcharge Reconciliation Report, and Data Collection, respectively) do not apply to policies written and reported under the following annual statement lines of business: federal flood; medical malpractice; group accident and health; all other accident and health; workers' compensation; excess workers' compensation, and surety.

(c) This section and §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division do not apply to:

(1) a farm mutual insurance company operating under the Insurance Code Chapter 911;

(2) a nonaffiliated county mutual fire insurance company described by the Insurance Code §912.310 that is writing exclusively industrial fire insurance policies as described by the Insurance Code §912.310(a)(2);

(3) a mutual insurance company or a statewide mutual assessment company engaged in business under Chapter 12 or 13, Title 78, Revised Statutes, respectively, before those chapters' repeal by §18, Chapter 40, Acts of the 41st Legislature, 1st Called Session, 1929, as amended by Section 1, Chapter 60, General Laws, Acts of the 41st Legislature, 2nd Called Session, 1929, that retains the rights and privileges under the repealed law to the extent provided by those sections; and

(4) premium and policies issued by an affiliated surplus lines insurer that a federal agency or court of competent jurisdiction determines to be exempt from a premium surcharge under the Insurance Code Chapter 2210.

(d) For all lines of insurance subject to §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) this section, §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division are effective June 1, 2011.

(e) For all other lines, this section, §§5.4172, 5.4173 and 5.4181 - 5.4192 of this division are effective October 1, 2011.

§5.4172. Premium Surcharge Definitions.

The following words and terms when used in §§5.4171, 5.4173 and 5.4181 - 5.4192 of this division (relating to Premium Surcharge Requirement, Premiums to be Surcharged, Allocation Method for Specified Lines of Insurance, Allocation Method for Other Lines of Insurance, Application of the Surcharges, Premium Surcharges are Mandatory, Remittance of Premium Surcharges, Offsets, Surcharges not Subject to Commissions or Premium Taxes, Determination of the Surcharge, Notification Requirements, Annual Premium Surcharge Report, Premium Surcharge Reconciliation Report, and Data Collection, respectively) shall have the following meanings unless the context clearly indicates otherwise:

(1) Affiliated insurer--An insurer that is an affiliate, as described by the Insurance Code §823.003, of an insurer authorized to engage in the business of property or casualty insurance in the State of Texas. Affiliated insurer includes an insurer not authorized to engage in the business of property or casualty insurance in the State of Texas.

(2) Affiliated surplus lines insurer--An eligible surplus lines insurer that is an affiliate, as described by the Insurance Code §823.003, of an insurer authorized to engage in the business of property or casualty insurance in the State of Texas.

(3) Exposure--The basic unit of risk that is used by an insurer to determine the insured's premium.

(4) Insured property--Real property, or tangible or intangible personal property, including automobiles, covered under an insurance policy issued by an insurer.

(5) Insurer--Each property and casualty insurer authorized to engage in the business of property or casualty insurance in the State of Texas and an affiliate of such an insurer, as described by the Insurance Code §823.003, including an affiliate that is not authorized to engage in the business of property or casualty insurance in the State of Texas, the Association, and the Texas Fair Access to Insurance Requirements Plan Association. The term specifically includes a county mutual insurance company, a Lloyd's plan, and a reciprocal or interinsurance exchange.

(6) Operations--A person's interest in property, or activities, that may result in, or give rise to, a loss that is insurable under a property or casualty insurance policy, including the use of a automobile; ownership, lease, or occupancy of a residence or other real property; and activities performed by a person in connection with the manufacture, distribution, or sale of goods or services. A person is considered to have operations in the catastrophe area if the person maintains an automobile or physical location in the catastrophe area, regardless

of whether that location is owned, leased, rented, or occupied by the person.

(7) Premises--A physical location where a person resides, or owns, leases, rents, or occupies real property, or has operations.

(8) Premium surcharge percentage--The percentage amount determined by the commissioner under §5.4173 of this division (relating to the Determination of the Surcharge).

§5.4181. Premiums to be Surcharged.

(a) The premium surcharge percentage shall be applied to:

(1) amounts reported as premium for the purposes of reporting under the Annual Statement, Exhibit of Premiums and Losses (Statutory Page 14), Texas; and

(2) if not reported as described in paragraph (1) of this subsection, those additional amounts collected that are subject to premium taxation by the comptroller, including policy fees not reported as premium; surplus lines premium tax; and independently procured premium tax.

(b) Premium surcharges do not apply to fees that are neither reported as premium in the Annual Statement, Exhibit of Premiums and Losses (Statutory Page 14), Texas, nor subject to premium taxation by the comptroller.

§5.4182. Allocation Method for Specified Lines of Insurance.

(a) The methods addressed in this section shall apply to all:

(1) policies written and reported under the following annual statement lines of business: fire; allied lines; multi-peril crop; farmowners; homeowners; commercial multi-peril (property); commercial multi-peril policies written on an indivisible premium basis, regardless whether reported as commercial multi-peril (property) or commercial multi-peril (liability); earthquake; private passenger auto no fault (personal injury protection (PIP)), other private passenger auto liability, and private passenger auto physical damage; and commercial auto no fault (personal injury protection (PIP)), other commercial auto liability, and commercial auto physical damage for policies where the premium is determined based on the geographic location of the exposures, or where the automobiles are principally garaged; boiler and machinery; burglary and theft;

(2) personal and residential policies, including boat owners, personal liability, personal umbrella, and personal inland marine policies; and

(3) personal and commercial risks assigned by the Texas Automobile Insurance Plan Association (TAIPA) pursuant to the Insurance Code Chapter 2151.

(b) If the policy is rated based on the geographic location of the insured's premises, operations, or insured property, the premium surcharge shall be determined by applying the premium surcharge percentage to the policy premium determined in §5.4181 of this division (relating to Premiums to be Surcharged), attributable to premises, operations, or insured property located in the catastrophe area.

(c) In cases where the policy is not rated based on the geographic location of the insured's premises, operations, or insured property, the insurer shall allocate premium to the catastrophe area based on the proportion the exposure in the catastrophe area bears to the total exposure on the policy. The premium surcharge percentage shall apply to that portion of the policy premium allocated to the catastrophe area.

§5.4183. Allocation Method for Other Lines of Insurance.

For all other applicable lines of insurance not specified in §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) the surcharge shall be determined as follows:

(1) For lines of insurance where, as part of its normal underwriting, rating, or data collection processes, the insurer has sufficient information to determine the premium or exposure for each location, or can otherwise reasonably allocate premium to the catastrophe area, the insurer shall use the direct allocation methods set forth in §5.4182 of this division and determine the premium surcharge amount by applying the premium surcharge percentage to the premium attributable to the catastrophe area.

(2) For other lines and types of insurance not included in paragraph (1) of this section, and where the insurer, including an affiliate, provides insurance to the named insured covering real property and/or tangible personal property under a commercial property policy or a commercial multi-peril policy, regardless whether such coverage is provided on a monoline or multi-peril basis, the premium surcharge shall be determine as follows:

(A) The insurer shall determine the catastrophe area allocation percentage as the proportion of premium attributable to the catastrophe area for property insured under the commercial property or commercial multi-peril policy.

(B) The premium surcharge shall be determined by multiplying the total Texas premium by the catastrophe area allocation percentage and the premium surcharge percentage.

(3) For other lines, and types of insurance not included in subsection (a) of this section, and where neither the insurer nor an affiliate of the insurer provides insurance to the named insured covering real property and/or tangible personal property under a commercial property policy or a commercial multi-peril policy, the premium surcharge shall be determined as follows:

(A) Prior to the effective date of each new policy, and at the renewal of each renewal policy, the insurer shall determine from the insured the catastrophe area allocation percentage. The catastrophe area allocation percentage is determined as the proportion of premium attributable to the catastrophe area for property insured under the commercial property or commercial multi-peril (property) policy or the percentage of self-insured premium attributable to property located in the catastrophe area in the case where the insured is self-insured.

(B) The premium surcharge shall be determined by multiplying the total Texas premium by the catastrophe area allocation percentage and the premium surcharge percentage.

(C) Information required to be collected by insurers under subparagraph (A) of this paragraph shall be collected regardless whether or not a premium surcharge is in effect on the effective date, in the case of new policies, or the renewal date, in the case of renewal policies.

(D) Insurers are not required to verify or otherwise determine the reasonableness of information provided to them under subparagraph (A) of this paragraph.

§5.4184. Application of the Surcharges.

(a) When assessed under the Insurance Code §2210.613, the premium surcharges shall apply to all policies with premises, operations, or insured property in the catastrophe area that are issued or renewed with effective dates in the assessment period specified in the commissioner's order, with two exceptions:

(1) insurers shall not surcharge policies, and are not responsible for collecting premium surcharges on policies, that did not go into effect or were cancelled as of the inception date of the policy; and

(2) for multi-year policies, the premium surcharge in effect on the effective date of the policy, or the anniversary date of the policy,

shall be applied to the 12-month premium for the applicable policy period.

(b) Premium surcharges are non-refundable under the Insurance Code §2210.613.

(1) If the policy is cancelled, a pro-rata portion of the surcharge is not returned to the policyholder; however,

(2) an additional surcharge shall not apply to a policy that was cancelled subsequent to the effective date of the policy, and is later reinstated. For purposes of this section a policy is reinstated if it covers the same period as the original policy without a lapse in coverage, except as provided in the Insurance Code §551.106.

(c) A mid-term policy change consists of all transactions on a policy occurring within a seven day period that result in a change in the premium.

(d) If a mid-term policy change increases the premium on the policy, insureds must pay an additional surcharge for the increased premium attributable to premises, operations, or insured property in the catastrophe area which shall be determined as follows:

(1) For policies where the premium surcharge is determined under §5.4182 or §5.4183(1) of this division (relating to Allocation Method for Specified Lines of Insurance and Allocation Method for Other Lines of Insurance), the additional premium surcharge is determined by applying the applicable premium surcharge percentage to that portion of the additional premium attributable to premises, operations or insured property located in the catastrophe area.

(2) For policies where the premium surcharge is determined under §5.4183(1) and (2) of this division, the additional premium surcharge is determined by applying the premium surcharge percentage and the catastrophe area allocation percentage to the additional premium.

(e) If a mid-term policy change decreases the premium, there shall be no corresponding decrease in the surcharge or refund of the surcharge.

(f) Surcharges or refunds shall apply to all premium changes due to exposure or premium audits, retrospective rating adjustments, or other similar adjustments that occur after policy expiration. Upon policy inception, the premium surcharge shall be collected on the deposit premium paid. If after exposure or premium audit, retrospective rating adjustment, or similar adjustment after policy expiration, an additional premium is required, an additional surcharge shall be paid. If after exposure or premium audit, retrospective rating adjustment, or other similar adjustment after policy expiration, the deposit premium exceeds the actual premium, the excess surcharge shall be refunded to the insured, and the insurer may credit any refund paid to the Association through the offset process described in §5.4187 of this division (relating to Offsets). Additional surcharges and refunds shall be determined as follows:

(1) For policies where the premium surcharge is determined under §5.4182 or §5.4183(1) of this division, the additional premium surcharge (or refund) is determined by applying the premium surcharge percentage in effect on the inception date of the policy, or the anniversary date of the policy in the case of multi-year policies, to the additional premium (or return premium) attributable to the catastrophe area.

(2) For policies where the premium surcharge is determined under §5.4183(1) and (2) of this division, the additional premium surcharge (or refund) is determined by applying the premium surcharge percentage and the catastrophe area allocation percentage to the additional premium (or return premium).

(g) Notwithstanding whether a surcharge was in effect on the inception date of the policy, or the anniversary date in the case of multi-year policies, no additional premium surcharges or refunds shall apply to premium changes resulting from exposure or premium audits, retrospective rating adjustments, or other similar adjustments that occur when there is no premium surcharge in effect.

§5.4186. Remittance of Premium Surcharges.

(a) Insurers shall remit to the Association the aggregate amount of surcharges paid by its policyholders; however, an affiliated surplus lines insurer may allow a surplus lines agent to remit premium surcharges to the Association on its behalf in accordance with any procedures established by the Association relating to premium surcharge remissions from surplus lines agents.

(b) Insurers, or surplus lines agents allowed by affiliated surplus lines insurers to remit surcharges pursuant to subsection (a) of this section, shall remit all surcharges paid by its insureds not later than the last day of the month following the month in which the surcharge was received.

(c) Insurers and agents may not allow, or require, policyholders to make separate payments for the surcharge amounts which are payable to the Association.

(d) Subsection (b) of this section applies to all insurers regardless of whether the insured paid the premium surcharge through an agent of the insurer or the insured paid the premium surcharge directly to the insurer.

(e) An affiliated surplus lines insurer who allows an agent to remit premium surcharges to the Association pursuant to subsection (a) of this section may be held liable by the department for the failure of its agent to remit the premium surcharges or timely remit the premium surcharges, pursuant to subsection (b) of this section.

§5.4187. Offsets.

(a) An insurer may credit a premium surcharge amount on its next remission to the Association if the insurer has already remitted the amount to the Association for:

(1) the portion of the surcharge the insurer was not able to collect from the insured prior to the collection of any funds for premium or any other obligation or debt owed to the insurer; or

(2) the portion of a surcharge paid to the Association in excess of a deposit premium as described in §5.4184 of this division (relating to Application of the Surcharges).

(b) An agent may not offset payment of a premium surcharge to the insurer for any reason. However, a surplus lines agent allowed by an affiliated surplus lines insurer to remit surcharges to the Association on its behalf under §5.4186(a) of this division (relating to Remittance of Premium Surcharges), may offset as provided in this section.

§5.4189. Notification Requirements.

(a) Insurers shall provide written notice to policyholders receiving a premium surcharge that their policy contains a surcharge. The notice shall read: "Texas Insurance Code Sections 2210.073 and 2210.613 require a premium surcharge be added to certain property and casualty insurance policies providing coverage in the catastrophe area to pay the debt service on public securities issued to pay Texas Windstorm Insurance Association claims resulting from a catastrophe event. A premium surcharge {in the amount of $_____} has been added to your premium. This premium surcharge is non-refundable under Texas

Insurance Code Section 2210.613. Should your policy be canceled by you or the insurer prior to its expiration date, the premium surcharge will not be refunded to you. Failure to pay the surcharge is grounds for cancellation of your policy."

(b) Insurers shall provide written notice to policyholders of the dollar amount of the premium surcharge.

(c) Notices required under subsections (a) and (b) of this section shall:

(1) be provided at the time the policy is issued, in the case of new business;

(2) be provided with the renewal notice, in the case of renewal business;

(3) be provided within 20 days of the end of the transaction period as specified in §5.4184(c) of this division (relating to Application of the Surcharges) for any mid-term change in the premium surcharge; and

(4) use at least 12 point font and either be contained on a separate page or shown in a conspicuous location on the declarations page.

§5.4190. Annual Premium Surcharge Report.

(a) This section does not apply to an insurer that, during the calendar year, exclusively wrote any or all of the following lines of insurance: federal flood insurance; medical malpractice insurance; accident and health insurance; workers' compensation insurance; or surety.

(b) No later than 90 days following the end of a calendar year in which a premium surcharge was in effect, each insurer shall provide the Association with an annual premium surcharge report for the calendar year. However, an annual premium surcharge report for a given year is not required if premium surcharges were in effect for less than 45 days within the calendar year.

(c) Annual premium surcharge reports shall provide information for each insurance company writing property or casualty insurance in the State of Texas, including affiliated surplus lines insurers, and affiliated insurers not authorized to engage in the business of insurance that issued independently procured insurance policies covering premises, operations, or insured property in the State of Texas.

(d) Annual premium surcharge reports shall provide information for all applicable annual statement lines of business for which the insurer reported premium for the applicable calendar year.

(e) Annual premium surcharge reports shall provide the following information:

(1) the name and contact information of the individual responsible for submitting the report;

(2) the five-digit NAIC number of the insurance company;

(3) the name of the insurance company;

(4) for policies with effective dates, or multi-year policies with anniversary dates, within the calendar year, separately for each surcharge period in effect during the calendar year, and within each surcharge period in effect during the calendar year for all applicable lines of business:

(A) For all policies subject to a premium surcharge:

(i) the total written premium attributable or allocated to premises, operations, or insured property in the catastrophe area; and

(ii) the total written premium attributable or allocated to premises, operations, or insured property outside the catastrophe area; and

(B) the total written premium for policies not subject to a premium surcharge because the insured had no premises, operations, or insured property in the catastrophe area;

(5) for policies effective in portions of the calendar year when no surcharge period was in effect, or in the case of multi-year policies with an anniversary date in portions of the calendar year when no surcharge was in effect, the total written premium;

(6) the total amount of premium surcharges collected during the applicable calendar year; and

(7) the total amount of premium surcharges remitted to the Association during the applicable calendar year.

(f) The Association shall:

(1) review the reports submitted under this section as necessary to determine:

(A) the consistency of premium surcharges actually remitted to the Association with premium surcharges shown in the reports as collected and the premium surcharges shown in the reports as remitted to the Association; and

(B) the consistency of premiums shown in the reports as attributable to the catastrophe area with premium surcharges shown in the reports as collected by the insurer, given the requirements regarding the determination of premium surcharges in this division;

(2) inform the department of any insurer the Association believes may not be in compliance with the rules established under this division; and

(3) before July 1 on each year reports are required to be submitted to the Association, provide an aggregate summary of the reports to the department.

§5.4191. Premium Surcharge Reconciliation Report.

(a) This section does not apply to an insurer that, during an applicable calendar year, exclusively wrote any or all of the following lines of insurance: federal flood insurance; medical malpractice insurance; accident and health insurance; workers' compensation insurance, or surety.

(b) Upon the written request of the department, an insurer shall provide the department with a premium surcharge reconciliation report for the year specified by the department in its request.

(c) Reconciliation reports shall be provided to the department within 10 working days after the date the request is received by the insurer.

(d) Reconciliation reports shall consist of the following information concerning premiums written and surcharges collected, separately for each applicable surcharge period, including periods in which no premium surcharges were in effect, within the specified year:

(1) premium written at policy issuance for policies effective within the year, including anniversary dates within the year on multi-year policies, separately for:

(A) premium subject to a premium surcharge, including premium allocated to the catastrophe area on policies having premises, operations, or insured property both in and outside of the catastrophe area; and

(B) premium not subject to a premium surcharge, including premium not allocated to the catastrophe area on policies hav-

ing premises, operations, or insured property both in and outside of the catastrophe area; and

(2) premium written due to mid-term coverage changes occurring within the specified time period separately for:

(A) premium increases subject to a premium surcharge, including premium allocated to the catastrophe area on policies having premises, operations, or insured property both in and outside of the catastrophe area; and

(B) premium not subject to a premium surcharge, including premium increases not allocated to the catastrophe area on policies having premises, operations, or insured property both in and outside of the catastrophe area and premium refunds, whether related to coverage within or without the catastrophe area; and

(3) total premium due to post-term premium changes occurring within the specified time period, including adjustments due to premium or exposure audits, retrospective rating adjustments, or other similar adjustments that occur after policy expiration, separately for:

(A) premium subject to a premium surcharge, including premium allocated to the catastrophe area on policies having premises, operations, or insured property both in and outside of the catastrophe area; and

(B) premium not subject to a premium surcharge, including premium not allocated to the catastrophe area on policies having premises, operations, or insured property both in and outside of the catastrophe area; and

(4) separately for paragraphs (1)(A), (2)(A), and (3)(A) of this subsection, the amounts of premium surcharges collected; and

(5) the total amount of written premium for policies written in the State of Texas as reported in the Annual Statement, Exhibit of Premiums and Losses (Statutory Page 14), Texas.

(e) Nothing in this section limits the department's authority to obtain information from insurers under the Insurance Code.

(f) A report provided to the department under this section may be provided to the Association.

§5.4192. Data Collection.

(a) The department may request from each insurer the information necessary to enable the department to determine the premium surcharge percentage applicable to insureds with premises, operations, or insured property located in the catastrophe area.

(b) For lines of insurance subject to §5.4182 of this division (relating to Allocation Method for Specified Lines of Insurance) for policies in force on or after October 1, 2011, and for lines of insurance subject to §5.4183 of this division (relating to Allocation Method for Other Lines of Insurance) for policies effective on or after October 1, 2011, each insurer shall maintain sufficient records to report the following information to the department:

(1) for policies where the premium surcharge was, or would be determined under §5.4182 or §5.4183(1) of this division, the total written premium attributable to the catastrophe area for policies with premises, operations, or insured property located in the catastrophe area; and

(2) for policies where the premium surcharge was, or would be determined under §5.4183(1) or (2) of this division, the total written premium allocated to the catastrophe area.

(c) When possible, and practical, the department will obtain information from the Texas Surplus Lines Stamping Office prior to requesting information from affiliated surplus lines insurers.

(d) Nothing in subsection (c) of this section should be read to mean that subsections (a) and (b) of this section do not apply to affiliated surplus lines insurers.

(e) Nothing in this section limits the department's authority to obtain information from insurers under the Insurance Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100368
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: February 16, 2011
Proposal publication date: July 30, 2010
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER F. MISCELLANEOUS INDUSTRIAL SOURCES

DIVISION 3. DEGASSING OF STORAGE TANKS, TRANSPORT VESSELS, AND MARINE VESSELS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the repeal of §§115.541, 115.542, and 115.545; adopts new §§115.540 - 115.542 and 115.545; and adopts the amendments to §§115.543, 115.544, 115.546, 115.547, and 115.549.

Sections 115.540 - 115.542, 115.544 - 115.546, and 115.549 are adopted *with changes* to the proposed text as published in the August 13, 2010, issue of the *Texas Register* (35 TexReg 6976). Section 115.543 and §115.547 are adopted *without changes* and the text will not be republished.

The adopted amended, repealed, and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Chapter 115, Subchapter F, Division 3, regulates the degassing of storage tanks, transport vessels, and marine vessels. Compliance with the rules is currently required for affected sources in the Houston-Galveston-Brazoria ozone nonattainment area and the Beaumont-Port Arthur area. Although not currently effective, the Chapter 115 degassing rules also apply in El Paso County as contingency measures that could become effective if the com-

mission determines the rules are necessary to comply with federal air quality standards.

On May 21, 2010, the commission published notice in the *Texas Register* (35 TexReg 4268) requiring affected sources in Collin, Dallas, Denton, and Tarrant Counties to comply with the current Chapter 115 degassing rules no later than May 21, 2011. The rules in Chapter 115, Subchapter F, Division 3, were adopted as a contingency measure for these four counties in the Dallas-Fort Worth area on April 27, 1994, and published in the *Texas Register* on May 13, 1994 (19 TexReg 3703). The contingency rules are being implemented as a result of the Dallas-Fort Worth area failing to attain the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS) by the June 15, 2010, attainment deadline based on monitoring data. On August 9, 2010, the EPA published a proposal to reclassify the nine-county Dallas-Fort Worth area as a serious nonattainment area under the 1997 eight-hour ozone NAAQS (75 FR 47746).

Beginning in April 2009, a series of petitions for rulemaking were submitted to the commission regarding the more stringent degassing requirements that became effective in the Houston-Galveston-Brazoria area on January 1, 2009. Although, these petitions were withdrawn before the scheduled agenda for the commission's consideration while evaluating the merit of these petitions, staff identified several portions of the degassing rules that could be clarified to facilitate compliance and enforcement. In the following months, numerous questions were also raised by affected regulated entities, consultants, and vendors regarding compliance with the requirements in Chapter 115, Subchapter F, Division 3. The adopted rulemaking addresses the concerns raised by stakeholders by revising Chapter 115, Subchapter F, Division 3, to clarify the degassing rule requirements for sources in all affected areas, provide additional flexibility for affected owners or operators by allowing for the use of alternative control options, and facilitate rule enforcement.

General Clarification of Rule Requirements

The adopted rulemaking reformats the existing rules in Chapter 115, Subchapter F, Division 3, to simplify and clarify the requirements. Some of these formatting changes include adopting new §115.540 to specify the rule applicability and define terms commonly used in this division, repealing §115.541 and §115.542, and adopting new §115.541 and §115.542 to consolidate the emission specifications and control requirements. In addition, the adopted rules make other non-substantive revisions to update the rule language to current *Texas Register* style and format requirements. Additional details regarding the general reformatting and clarification changes are discussed in the SECTION BY SECTION DISCUSSION portion of this preamble.

Additional Control Options

One concern raised by stakeholders was that the existing rules do not adequately address the use of several types of control technologies that could achieve equivalent volatile organic compounds (VOC) emission reductions. The existing rules require that VOC vapors be routed to a device that maintains a control efficiency of at least 90%. The adopted rules specifically provide for the use of the following equivalent control options to comply with the emission specifications in the rules.

The adopted rules allow for the use of flares that are designed and operated in accordance with 40 Code of Federal Regulations (CFR) §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)). In addition to complying with the operating parameters in 40 CFR §60.18, the commission is requiring that flares used during degassing operations must be lit at all times when VOC vapors are routed to the device. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the rules is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device.

The existing rules require VOC vapors from affected tanks or vessels to be routed to a control device until the concentration is less than 34,000 parts per million by volume (ppmv), expressed as methane. However, as the VOC vapor concentration approaches 34,000 ppmv, there may not be sufficient heat content to meet the minimum net heating value requirements in 40 CFR §60.18. Therefore, it may be necessary to monitor the net heating value of the VOC vapors routed to the flare to ensure there is sufficient energy available to support combustion. The adopted rules provide the following options for demonstrating compliance with the minimum net heating value requirements in 40 CFR §60.18 during degassing operations: continuously monitor the net heating value of the gas stream routed to the flare; assume 3.4% of the net heating value from the VOC vapors routed to the flare and continuously monitor the supplemental fuel added and use calculations to demonstrate sufficient net heating value of the VOC vapors routed to the flare; or use calculations to demonstrate sufficient net heating value of the VOC vapors routed to the flare.

The adopted rules allow for the use of recirculation systems as an option for meeting the control requirements of the rules. The adopted rules define a recirculation system as a system that is vapor-tight and composed of piping, ductwork, connections, flow-inducing devices, and a control device. The recirculation system conducts VOC vapor from a storage tank, transport vessel, or marine vessel to a control device and conducts the exhaust from the outlet of the control device back into the same storage tank, transport vessel, or marine vessel. Currently, the commission is aware of two types of recirculation systems available for degassing operations that use condensation or absorption processes to transfer VOC from the vapor space inside the tank or vessel into liquid form.

To minimize pressurization in the tank or vessel, which could cause increased emissions, the adopted rules require that the recirculation system not cause the pressure inside the tank or vessel to exceed one inch water pressure at any time during the degassing operation. The adopted rules will also require continuous monitoring of the tank pressure or the continuous monitoring of the flow rate at the inlet and outlet of the control device. To ensure that the recirculation system is vapor-tight during operation, the commission is requiring the recirculation system to be monitored for VOC leaks using the procedure in Method 21 (40 CFR Part 60, Appendix A-7) and to begin this monitoring within one hour after beginning any degassing operation. The adopted rules also require continuous monitoring of the outlet gas temperature of a condensation system that is part of a recirculation system to ensure that the temperature is below the recirculation system manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device.

The commission is adopting an option to limit the VOC concentration at the outlet of the control device to less than 500 ppmv at 0% oxygen, dry basis, expressed as methane. The commission adopts this option to limit the VOC concentration of the control device exhaust gas as an equivalent or more stringent alternative to using a control device that maintains a control efficiency of at

least 90%. The commission is adopting this option to provide affected owners or operators with an alternative control option that would alleviate some of the testing and monitoring requirements for devices that can maintain a low exhaust gas concentration.

Clarification of Monitoring and Testing Requirements

One of the concerns raised by stakeholders was that the existing rules do not adequately address the monitoring and testing requirements necessary to demonstrate compliance with this division. The adopted rules specifically require monitoring and testing requirements.

The commission adopts clarifications to the procedure for taking the VOC concentration measurements required in this division. The adopted rules specify that the VOC concentration measurements required to determine if the tank or vessel can be vented to the atmosphere without control for the remainder of the degassing operation must be taken over a period of five minutes. Further, none of the measurements can exceed the thresholds established in the rules. This clarification is consistent with the concentration monitoring requirements in the Refinery Maintenance, Startup, and Shutdown (MSS) Model Permit.

The current rules for the Houston-Galveston-Brazoria area require the owner or operator to monitor the VOC concentration once every 12 hours for five readings after the tank or vessel is disconnected from the control device. This requirement was added in 2007 to address concerns that if liquid remains in the tank or vessel, then the VOC concentration could increase above the limits specified in the rules after the control device is disconnected. Stakeholders have commented that this requirement is unnecessary and overly burdensome. In response to these concerns, the commission is adopting additional options for demonstrating that the VOC concentration inside the tanks or vessel does not increase above the concentration limit established in the control requirements. Specific details regarding these additional options are included in the SECTION BY SECTION DISCUSSION portion of this preamble. Additionally, the commission is adopting rules that expand these requirements to all areas subject to this division.

The commission is specifically adopting rules to require control efficiency demonstrations conducted in accordance with the approved test methods in §115.545 for any control device used to comply with the option to maintain a control efficiency of at least 90% when the device is being used for degassing operations. The adoption of this requirement to conduct an initial control efficiency demonstration is intended to be a clarification of the existing requirements and is not intended to impose any additional requirements on affected sources. The commission is also requiring the control device to be retested prior to use for degassing operations or within 60 days after any modification that could reasonably be expected to affect the efficiency of a control device The commission is also requiring a periodic control efficiency demonstration to be conducted at least once every 60 months for a portable control device. These retesting provisions are necessary to demonstrate that the control device continues to meet the 90% control efficiency requirements after modification or if substantial time has passed since the previous demonstration. Additionally, it has come to the commission's attention that many of the control devices used to control emissions during degassing operations are portable devices. It is not the commission's intent that moving a portable control device from one tank or vessel to another will trigger the 60-day retesting requirement. The commission is exempting a portable thermal oxidizer or vapor combustor from the periodic control efficiency demonstration if the combustion chamber temperature is at least 1,400 degrees Fahrenheit and the flow rate of the VOC vapors routed to the device is limited to assure at least a 0.5 second combustion chamber residence time when the device is in use.

The commission is also adopting rules to allow the use of additional test methods to demonstrate compliance with this division. The adopted rules will allow for the use of test methods not currently included in the existing rules. The adopted rules will also allow test methods currently available for use by affected sources in the Houston-Galveston-Brazoria area to be used by affected sources in all areas subject to this division.

The commission adopts clarifications for the storage temperature used for determining the true vapor pressure of volatile organic liquids stored at or above ambient temperatures. The existing rules requires the use of actual storage temperature to determine the true vapor pressure of volatile organic liquids stored in an affected storage tank, transport vessel, or marine vessel. The commission is adopting rules to allow the actual storage temperature of an unheated tank or vessel to be determined using the maximum local monthly average ambient temperature as reported by the National Weather Service. The commission is also adopting rules to allow the actual storage temperature of a heated tank or vessel to be determined using either the measured temperature or the temperature set point of the tank or vessel.

The adopted rulemaking requires the owner or operator of a storage tank, transport vessel, or marine vessel subject to the requirements in this division to notify the appropriate regional office of upcoming degassing operations upon request by authorized representatives of the executive director. The commission adopts this requirement to facilitate enforcement of the rules.

SECTION BY SECTION DISCUSSION

In addition to the revisions to clarify the rules and provide additional flexibility, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the *Texas Legislative Council Drafting Manual,* September 2010. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terminology like *that, which, shall,* and *must.* References to the Dallas/Fort Worth area and the Houston/Galveston area have been updated to the Dallas-Fort Worth area and the Houston-Galveston-Brazoria area respectively to be consistent with current terminology for the region. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

The commission also adopts changes to the rule not included at proposal. The commission revises any proposed references to *volatile organic liquids or vapors* to *volatile organic compounds.* The commission changes the title of Chapter 115, Subchapter F, Division 3 from *Degassing and Cleaning of Storage Tanks, Transport Vessels, and Marine Vessels to Degassing of Storage Tanks, Transport Vessels, and Marine Vessels.* As discussed elsewhere in this preamble, this change is intended to clarify the scope of the rule. In addition, the rule has been revised from proposal to eliminate any references to cleaning operations to further clarify the rule applicability. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

Section 115.540, Applicability and Definitions

The commission adopts new §115.540 that will add applicability and definitions to clarify the Chapter 115, Subchapter F, Division 3 rules. Adopted new §115.540 establishes consistency with other rules in Chapter 115 and improves the readability of the rules by first defining the units affected by and terms used in the subsequent requirements.

The commission adopts new §115.540(a) to specify that the provisions in this division apply to degassing during, or in preparation of, cleaning of any storage tank, transport vessel, or marine vessel located in the Beaumont-Port Arthur (Hardin, Jefferson, and Orange Counties), Dallas-Fort Worth (Collin, Dallas, Denton, and Tarrant Counties only), El Paso, and Houston-Galveston-Brazoria (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) areas. Adopted new subsection (a) clarifies that this division applies to degassing any storage tank, transport vessel, or marine vessel containing volatile organic compounds with a true vapor pressure greater than or equal to 0.5 pounds per square inch absolute (psia) under actual storage conditions unless specifically exempted in §115.547. Adopted new subsection (a) also clarifies that in this division, the operator of any storage tank, transport vessel, or marine vessel refers to the regulated entity performing or outsourcing the degassing operation. Adopted new subsection (a) indicates that this division applies to any storage tank, transport vessel, or marine vessel in the Beaumont-Port Arthur and Houston-Galveston-Brazoria areas. Adopted new subsection (a) also indicates that this division applies to any storage tank or transport vessel in the Dallas-Fort Worth and El Paso areas.

Adopted new §115.540(b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), in 30 TAC §§3.2, 101.1, or 115.10 the terms used in this division have the meanings commonly used in the field of air pollution control. Adopted new subsection (b) also indicates that in addition, the following meanings apply in this division unless the context clearly indicates otherwise.

Adopted new §115.540(b)(1) defines *Cleaning* as the process of washing or rinsing a storage tank, transport vessel, or marine vessel, or removing sludge or rinsing liquid from a storage tank, transport vessel, or marine vessel. As discussed in the RESPONSE TO COMMENTS section of this preamble, the word *vapor* was removed from the proposed definition of *Cleaning* to help clarify the processes intended to be subject to this rule. The commission is revising this definition to help clarify the rule applicability.

Adopted new §115.540(b)(2) defines *Degassing* as the process of removing VOC vapor from a storage tank, transport vessel, or marine vessel during, or in preparation of, cleaning. As discussed in the RESPONSE TO COMMENTS section of this preamble, the definition of *Degassing* has been revised from proposal to clarify that this term applies to activities that occur during, or in preparation of, cleaning. The commission is revising this definition to further clarify the rule applicability.

As discussed in the RESPONSE TO COMMENTS section of this preamble, the commission is adopting new §115.540(b)(3) to define a *Drain-dry floating roof tank* as a floating roof tank designed to drain its entire contents completely to a sump in a manner that leaves no free-standing liquid in the tank or the sump. The only stock liquid available for evaporation in a drain-dry floating roof tank is that which clings to the tank bottom and other wetted surfaces under the floating roof. This definition comes from American Petroleum Institute (API) Technical Report 2568, Evaporative Loss from the Cleaning of Storage Tanks (November 2007).

Adopted new §115.540(b)(4), originally proposed as §115.540(b)(3), defines *Recirculation system* as a system that is vapor-tight and composed of piping, ductwork, connections, flow inducing devices, and a control device. Adopted new paragraph (4) states that the recirculation system conducts VOC vapor from a storage tank, transport vessel, or marine vessel to a control device and conducts the exhaust from the outlet of the control device back into the same storage tank, transport vessel, or marine vessel. Adopted new paragraph (4) also indicates that the recirculation system does not include the storage tank, transport vessel, or marine vessel that is being degassed. The commission is adding this definition to fully describe the type of system being adopted as a new option to control VOC vapors during degassing operations.

Adopted new §115.540(b)(5), originally proposed as §115.540(b)(4), defines *Storage capacity* as the volume of a storage tank as determined by multiplying the internal cross-sectional area of the tank by the average internal height of the tank shell or the volume of a transport vessel or marine vessel as determined by the manufacturer's original design capacity. The definition is intended to account for sloped tank floors and sumps by relying on the average internal height of the tank shell to determine the maximum amount of liquid the tank can hold if filled to the top of the tank shell with inflow and outflow pipes closed off and any floating roof absent. The average internal height may be conservatively measured as the maximum height from the bottom of a sump to the top of the tank shell. Use of this measurement will result in an overestimate of the volume of a tank with a sloped floor. The existing rule uses several different terms, including nominal storage capacity, to denote the tanks and vessels that are subject to these requirements. The commission adopts this definition and uses the term consistently throughout this rulemaking. The adopted change is not intended to alter any existing rule requirements or to cause any additional sources to be subject to the existing rule requirements.

Adopted new §115.540(b)(6), originally proposed as §115.540(b)(5), defines *Storage tank* as a stationary vessel, reservoir, or container used to store VOC. This definition does not include components that are not directly involved in the containment of liquids or vapors, subsurface caverns or porous rock reservoirs, or process tanks or vessels.

Adopted new §115.540(b)(7), originally proposed as §115.540(b)(6), defines *Vapor-tight* as a condition that exists when no component of a system has a leak greater than 500 parts per million expressed as methane measured using Method 21 (40 CFR Part 60, Appendix A-7). The commission is adopting this definition to help clarify existing requirements that use this term. Although there are no additional monitoring requirements included in the adopted rule to demonstrate compliance with vapor-tight requirements, a notice of violation could be issued to the owner or operator of the tank or vessel if an authorized representative of the executive director, the EPA, or any local air pollution control agency with jurisdiction determined the vapor-tight condition was not maintained.

Section 115.541, Emission Specifications

The commission adopts the repeal of existing §115.541 in order to reformat and clarify the emission specifications in this division.

The adopted repeal is not intended to remove any of the existing emission specifications. The existing requirements in this section are either being incorporated into the adopted new §115.541 or the adopted new control requirements in §115.542.

The commission adopts new §115.541 to include the emission specifications for the degassing of storage tanks, transport vessels, or marine vessels.

Adopted new §115.541(a) requires all VOC vapors from a storage tank, transport vessel, or marine vessel subject to this division to be routed to a control device in accordance with the control requirements in §115.542 during degassing operations. Adopted new subsection (a) incorporates the existing emission specifications in §115.541(a)(1)(A) and (2)(A), and (b)(2) and does not impose a new requirement on affected sources. In response to comments, subsection (a) has been revised from proposal to specify that this requirement does not apply if the measured VOC concentration is less than 34,000 ppmv, expressed as methane or 50% of the lower explosive limit (LEL). The adopted change is intended to clarify the rule applicability.

Adopted new §115.541(b) prohibits the intentional bypassing of a control device used to comply with the requirements in this division. Adopted new subsection (b) also requires any visible VOC leak originating from the control device, or other associated product recovery device, to be repaired as soon as practical. Adopted new subsection (b) incorporates the existing emission specifications in §115.541(a)(1)(D) and (2)(D), and (b)(4) and does not impose a new requirement on affected sources.

Adopted new §115.541(c) prohibits avoidable liquid or gaseous leaks, as detected by sight or sound, from the degassing operations. Adopted new subsection (c) incorporates the existing emission specifications in §115.541(a)(1)(C) and (2)(C), and (b)(3) and does not impose a new requirement on affected sources.

Adopted new §115.541(d) requires a transport vessel to be kept vapor-tight at all times until the VOC vapors are routed to a control device. Adopted new subsection (d) incorporates the existing emission specifications in §115.541(a)(2)(E) and does not impose a new requirement on affected sources.

Adopted new §115.541(e) has been reformatted from proposal; however, these changes are non-substantive and only intended to improve the readability of the rule. Adopted new §115.541(e)(1) requires a marine vessel to have all cargo tank closures properly secured or maintain a negative pressure within the vessel when a closure is opened. Adopted new §115.541(e)(1) requires a marine vessel to have all pressure or vacuum relief valves operating within certified limits, as specified by classification society or flag state, until the VOC vapors are routed to a control device. Adopted new subsection (e) incorporates the existing emission specifications in §115.541(b)(5) and does not impose a new requirement on affected sources.

As discussed elsewhere in this preamble, in response to comments §115.541(f) has been revised from proposal to provide some exceptions to the requirements based on tank design and the contents of the material being stored in the tank. As proposed, subsection (f) would have required all VOC vapors from a floating roof storage tank to be routed to a control device immediately but no later than 24 hours after the tank has been emptied to the extent practical or the drain pump loses suction. Adopted new §115.541(f)(1) requires all VOC vapors from a floating roof storage tank that is not a drain-dry floating roof storage tank to be routed to a control device as soon as practical but no later than 24 hours after the tank has been emptied to the extent practical or the drain pump loses suction for a floating roof storage tank containing VOC liquids with a true vapor pressure greater than or equal to 1.5 psia under actual storage conditions. Adopted new §115.541(f)(2) requires all VOC vapors from a floating roof storage tank that is not a drain-dry floating roof storage tank must be routed to a control device as soon as practical but no later than 72 hours after the tank has been emptied to the extent practical or the drain pump loses suction for a floating roof storage tank containing VOC liquids with a true vapor pressure less than 1.5 psia under actual storage conditions. Adopted new §115.541(f)(3), which provides an alternative to new subsection (f)(1) and (2), requires that all VOC vapors from a floating roof storage tank that is not a drain-dry floating roof storage tank must be routed to a control device as soon as practical but no later than the time limit specified in a permit issued under 30 TAC Chapter 116 up to a maximum of 72 hours after the tank has been emptied to the extent practical or the drain pump losses suction. The commission adopts these new requirements to clarify when the rules in this division begin to apply and to minimize standing idle losses from floating roof storage tanks.

Section 115.542, Control Requirements

The commission is adopting the repeal of existing §115.542 in order to reformat and clarify the emission specifications in this division. The adopted repeal is not intended to remove any of the existing emission specifications. The existing requirements in this section are being incorporated into the proposed new §115.542.

The commission adopts new §115.542 to include the control requirements for the degassing of storage tanks, transport vessels, or marine vessels.

Adopted new §115.542(a) requires a control device used to comply with the emission specifications in §115.541 to meet one of the following conditions at all times when VOC vapors are routed to the device. The commission is including several equivalent options to limit VOC emissions from degassing operations that occur during, or in preparation of, cleaning an affected storage tank, transport vessel, or marine vessel.

Adopted new §115.542(a)(1) includes the same requirement in existing §115.541(a)(1)(B) and (2)(B), and (b)(2) for a control device to maintain a control efficiency of at least 90%. Adopted new paragraph (1) also clarifies the commission's intent that any control device used to comply with this division must be operated in a manner consistent with how the device was operated during the control efficiency demonstration required in §115.544(c).

Adopted new §115.542(a)(2) requires a flare that is used to comply with the requirements in this division to be designed and operated in accordance with 40 CFR §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and to be lit at all times when VOC vapors are routed to the flare. As discussed elsewhere in this preamble, although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the rule is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device. Adopted new §115.542(a)(2) was revised from proposal to specifically incorporate the version of 40 CFR §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)).

Adopted new §115.542(a)(3) allows a recirculation system to be used to comply with the requirements in this division provided it does not cause the pressure inside the tank or vessel to increase

by more than one inch water pressure at any time during the degassing operation.

Adopted new §115.542(a)(4) allows a control device used to comply with the requirements of this division provided that the VOC concentration at the outlet of the control device is less than 500 ppmv at 0% oxygen, dry basis, expressed as methane.

Adopted new §115.542(b) requires all VOC vapors to be routed to a control device until the VOC concentration is less than 34,000 ppmv, expressed as methane or less than 50% of the LEL. In response to comments, all proposed requirements that the percent LEL be expressed as methane have been removed from the adopted rule. After one of the conditions has been satisfied, the tank or vessel may be vented to the atmosphere without control for the remainder of the degassing operation, except as specified in §115.544(b)(4). The commission is expanding the requirement in §115.544(b)(4) to all applicable areas subject to the rules. The reference to §115.544(b)(4) is necessary to clarify that the additional monitoring required by that section still applies. For sources in the Houston-Galveston-Brazoria area, adopted new subsection (b) contains the same requirements as existing §115.542(a)(6) and (b)(5) and compliance with the original requirement was required by January 1, 2009.

The commission is repealing the options in existing §115.542(a)(5) and (b)(4) for sources in the Beaumont-Port Arthur, Dallas-Fort Worth, or El Paso areas. The commission is repealing the existing option for the tank or vessel to be vented to the atmosphere without control for the remainder of the degassing operation once the true vapor pressure inside the vessel has been reduced to less than 0.5 psia since this measurement is more appropriately referenced in terms of a VOC vapor concentration rather than a liquid characteristic. The commission is also repealing the existing option for the tank or vessel to be vented to the atmosphere without control once a turnover of at least four vapor space volumes, or four turnovers of the vapor space under a floating roof, has occurred. If the tank or vessel is drained dry and if the flow of displacement gases is measured properly, four turnovers would generally be sufficient to reduce VOC concentrations to less than 34,000 ppmv. However, if liquids remain in the bottom of the tank or vessel, as commonly occurs due to irregularities in the vessel surface, the remaining liquid would continue to be a source of VOC emissions after the four turnover criterion has been satisfied.

In addition, the commission is providing sources in the Beaumont-Port Arthur, Dallas-Fort Worth, or El Paso areas with the option for the tank or vessel to be vented to the atmosphere without control for the remainder of the degassing operation once the VOC concentration before the inlet to the control device is less than 50% of the LEL. The adopted control requirements allow the tank or vessel to be vented to the atmosphere without control once the VOC concentration reaches 34,000 ppmv, expressed as methane or 50% of the LEL. The adopted new option for the tank or vessel to be vented to the atmosphere without control once the VOC concentration is less than 50% of the LEL as stringent than the existing option for the tank or vessel to be vented to the atmosphere without control once the VOC concentration reaches 34,000 ppmv, expressed as methane. Existing §115.542(b)(4) uses 20% of the LEL as one of the options for determining when marine vessels in the Beaumont-Port Arthur area may be vented to the atmosphere without control. Because the LEL criterion is an option to allow flexibility in measurement methods and because the existing 34,000 ppmv concentration limit is the least stringent option, the adopted option to allow 50% of the LEL instead of 20% of LEL in adopted new subsection (b) will not allow an increase in VOC emissions over those allowed under existing §115.542(b)(4).

Adopted new §115.542(c) requires degassing equipment to be designed and operated to prevent avoidable liquid or gaseous VOC leaks. Adopted new subsection (c) contains the same requirement in existing §115.542(a)(4) and (b)(3).

Adopted new §115.542(d) requires that when degassing is effected through the hatches or manways of a storage tank, all lines must be equipped with fittings that make vapor-tight connections. Adopted new subsection (d) contains portions of the requirement in existing §115.542(a)(3). Proposed new subsection (d) would have also required all lines to be closed when disconnected or equipped to discharge residual VOC in the line into a closed recovery or disposal system after degassing is complete. However, in response to comments the commission is deleting this requirement because the VOC concentration in the lines will already be less than the VOC concentration that is required to be routed to a control device and therefore will not need to be controlled to demonstrate compliance with the requirements in this division.

Adopted new §115.542(e) requires that when degassing is effected through the hatches of a transport vessel with a loading arm equipped with a vapor collection adapter, a pneumatic, hydraulic, or other mechanical means must be provided to force a vapor-tight seal between the adapter and the hatch. Adopted new subsection (e) also requires a means to be provided to minimize liquid drainage from the degassing equipment when it is removed from the hatch or to accomplish drainage before such removal. Adopted new subsection (e) contains the same requirement in existing §115.542(a)(2).

Adopted new §115.542(f) requires that when degassing is effected through the hatches of a marine vessel with a loading arm equipped with a vapor collection adapter, then pneumatic, hydraulic, or other mechanical means must be provided to force a vapor-tight seal between the adapter and the hatch, or a negative pressure inside the cargo tank must be maintained. Adopted new subsection (f) also requires a means to be provided to minimize liquid drainage from the degassing equipment when it is removed from the hatch or to accomplish drainage before such removal. Adopted new subsection (f) contains the same requirement in existing §115.542(b)(2).

Section 115.543, Alternate Control Requirements

The commission adopts non-substantive revisions to §115.543 necessary to comply with current rule formatting standards without changes from proposal.

Section 115.544, Inspection, Monitoring, and Testing Requirements

The commission is changing the title of §115.444 from *Inspection Requirements to Inspection, Monitoring, and Testing Requirements* to reflect the adopted changes to the content of this section.

The commission adopts subsection (a) to specify the inspection requirements that apply during the degassing of any storage tank, transport vessel, or marine vessel subject to this division.

The commission is amending §115.544(a)(1) with non-substantive changes necessary to comply with current rule formatting

standards. Amended paragraph (1) requires inspection for visible liquid leaks, visible fumes, or significant odors resulting from VOC transfer operations that are conducted during each degassing operation.

The commission is amending §115.544(a)(2) with non-substantive changes necessary to comply with current rule formatting standards. Amended paragraph (2) requires degassing through the affected transfer lines to be discontinued when a leak is observed that cannot be repaired within a reasonable length of time. The commission is removing the sentence in existing paragraph (2) that indicates that the intentional bypassing of a vapor control device during degassing is prohibited. The commission is removing this superfluous sentence because the same requirement is already more appropriately included in the emission specifications in §115.542.

Adopted §115.544(b) specifies the monitoring requirements that apply during the degassing of any storage tank, transport vessel, or marine vessel subject to this division. Adopted subsection (b) also indicates that monitoring at least once every 15 minutes is sufficient to demonstrate compliance with the continuous monitoring requirements in this subsection.

Adopted §115.544(b)(1) requires any monitoring device used to comply with the requirements in this subsection to be installed, calibrated, maintained, and operated according to the manufacturer's instructions. The commission is adopting paragraph (1) to clarify the expectations associated with monitoring equipment used to comply with the requirements in this division.

Adopted §115.544(b)(2) requires the owner or operator to monitor any operational parameters necessary to demonstrate the proper functioning of a control device used to comply with the requirements in this division at all times when VOC vapors are routed to the device. Adopted paragraph (2) contains the same monitoring requirements in existing §115.546(2) and also includes the applicable monitoring requirements associated with the adopted new control options.

Adopted §115.544(b)(2)(A) requires the owner or operator to continuously monitor the exhaust gas VOC concentration of any carbon adsorption system that regenerates the carbon bed directly to determine breakthrough. Alternatively, adopted subparagraph (A) requires the owner or operator to periodically monitor the exhaust gas VOC determine breakthrough and switch the exhaust gas flow to fresh carbon for any carbon adsorption system that does not regenerate the carbon bed directly, as specified by 40 CFR §61.354(d) (as amended through October 17, 2000 (65 FR 62160)), except that any monitoring must be conducted at intervals no greater than 20% of the design carbon replacement interval. Adopted §115.544(b)(2)(A) was revised from proposal to specify the applicable version of 40 CFR §60.354(d). Adopted subparagraph (A) contains the requirements in existing §115.546(2)(C). In addition, adopted subparagraph (A) clarifies that the owner or operator must switch the exhaust gas flow to fresh carbon for any carbon adsorption system that does not regenerate the carbon bed directly and clarifies that any monitoring must be conducted at intervals no greater than 20% of the design carbon replacement interval. The commission is adopting these additional requirements to account for the high flow rate conditions encountered during degassing operations. In addition, adopted subparagraph (A) specifies that for the purpose of this division, breakthrough is defined as a measured VOC concentration exceeding 100 ppmv, expressed as methane above background. The adopted threshold is based on the requirements in the Refinery MSS Model Permit.

Adopted §115.544(b)(2)(B) requires the owner or operator to continuously monitor the inlet and outlet gas temperature of a catalytic incinerator. Adopted subparagraph (B) contains the same requirements in existing §115.546(2)(B).

Adopted §115.544(b)(2)(C) requires the owner or operator to continuously monitor the outlet gas temperature of a condensation system to ensure that the temperature is below the manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device. The adopted monitoring and associated recordkeeping requirement also apply if the condensation system is part of a recirculation system.

Adopted §115.544(b)(2)(D) requires the owner or operator to continuously monitor the exhaust gas temperature immediately downstream of a direct-flame incinerator. Adopted subparagraph (B) contains the same requirements in existing §115.546(2)(C).

Adopted §115.544(b)(2)(E) requires the owner or operator to comply with one of the monitoring requirements in clauses (i) - (iv) if a flare is used to comply with the requirements in this division. In response to comments, subparagraph (E) was revised to clarify that the purpose of these monitoring requirements is to demonstrate compliance with the requirements in 40 CFR §60.18. In response to comments, clauses (i) - (iii) were amended from proposal to refer the *gas stream* routed to the flare and not just the *VOC vapors* routed to the flare. Adopted clause (i) requires the owner or operator to continuously monitor the net heating value of the gas stream routed to the flare. In response to comments, changes were made to the proposed language in clause (ii). As proposed, clause (ii) would have required the owner or operator to assume zero net heating value contribution from the VOC vapors routed to the flare. Adopted clause (ii) requires the owner or operator to continuously monitor the total volume of supplemental fuel added to the gas stream routed to the flare and continuously maintain sufficient supplemental fuel to meet the minimum net heating value requirements in 40 CFR §60.18 assuming that the net heating value of the degassed VOC vapor is equivalent to a level corresponding to 50% of the LEL. New clause (ii) also allows the owner or operator to estimate the flow rate of the VOC vapors from the tank or vessel if the flow rate is not monitored. Proposed clause (ii) would have required the owner or operator to continuously monitor the total volume of supplemental fuel added to the VOC vapors routed to the flare and assume the net heating value of the VOC vapors routed to the flare is zero. Adopted clause (iii) requires the owner or operator to use calculations to demonstrate that for the material stored in the tank or vessel the net heating value of the gas stream routed to the flare cannot drop below the minimum net heating value requirements in 40 CFR §60.18 until the concentration of VOC in the vapors being routed to the flare is less than the concentration limits in §115.542(b). In response to comments, a new clause (iv) is added to allow for the monitoring of hydrogen content instead of net heating value for non-assisted flares electing to comply with 40 CFR §60.18(c)(3)(i).

Adopted §115.544(b)(2)(F) requires the owner or operator to use one of the following methods to monitor the exhaust gas VOC concentration for any control device used to comply with the option in §115.542(a)(4) to limit exhaust concentration. Proposed subparagraph (F) would have required monitoring the exhaust gas VOC concentration at least once per hour. However, in re-

sponse to comments, adopted subparagraph (F) requires the owner or operator to perform a single one-hour test to demonstrate the concentration of the VOC is below the concentration limit in §115.542(a)(4). Adopted subparagraph (F) also specifies the test must begin within one hour after the start of the degassing operation. The beginning of the degassing operation is when peak VOC concentration to the control device is expected. If the control device demonstrates that the VOC concentration is less than the limit during this initial one-hour test, then further testing during that same degassing event should not be necessary. In addition, as proposed, subparagraph (F) would have required the owner or operator of any internal combustion engine used as a control device to monitor the exhaust gas VOC concentration hourly for the entire duration of the degassing event. As discussed in the RESPONSE TO COMMENTS portion of this preamble, the commission is not adopting this requirement for engines and has instead adopted a subparagraph (I) that specifies monitoring exhaust gas oxygen monitoring as the appropriate parameter monitoring for internal combustion engines.

Adopted subparagraph (F) also specifies that the VOC concentration must be determined using the methods listed in adopted clauses (i) and (ii). Adopted clause (i) requires the VOC concentration to be determined by using the integrated bag sampling procedure in Method 18 (40 CFR Part 60, Appendix A) §§8.2.1.1 - 8.2.1.4 and a total hydrocarbon analyzer that meets instrument and calibration specifications in Method 21. As an alternative to clause (i), adopted clause (ii) requires the VOC concentration to be determined by continuously monitoring the exhaust gas VOC concentration using Method 25A (40 CFR Part 60, Appendix A).

Adopted §115.544(b)(2)(G) requires the owner or operator to continuously monitor the combustion chamber temperature of a thermal oxidizer or vapor combustor. Adopted subparagraph (G) also requires the owner or operator to continuously monitor the gas flow rate into the thermal oxidizer or vapor combustor to determine the combustion chamber residence time if necessary to demonstrate compliance with §115.544(c)(3). In response to comments, adopted subparagraph (G) was revised from proposal to apply the requirements for thermal oxidizers to both thermal oxidizers and vapor combustors.

Adopted §115.544(b)(2)(H) requires the owner or operator to continuously monitor the pressure inside the tank or vessel or continuously monitor the gas flow rate at the inlet and outlet of the control device if a recirculation system is used to comply with this division. Adopted subparagraph (H) also requires the owner or operator to monitor for VOC leaks using the procedure in Method 21 and begin this monitoring within one hour after beginning any degassing operation. For the purposes of this requirement, the adopted rule defines a leak as a screening concentration greater than 500 ppmv above background as methane for all components.

In response to comments, the commission is adopting §115.544(b)(2)(I) specifying that for an internal combustion engine, the owner or operator shall continuously monitor the engine exhaust gas oxygen content throughout the degassing operation as an indicator of the proper operation of the engine.

In response to comments, the commission is adopting §115.544(b)(2)(J) specifying that for a control device not listed, the owner or operator shall continuously monitor one or more operational parameters sufficient to demonstrate proper functioning of the device to design specification. The commission is adopting this provision to ensure the operational parameter monitoring of any device used to comply with the requirements in this division.

Adopted §115.544(b)(3) requires the owner or operator to monitor the VOC concentration to demonstrate compliance with the VOC concentration or percent LEL limits in §115.542(b) and determine if the storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control for the remainder of the degassing operation, except as specified in paragraph (4). Adopted §115.544(b)(3)(A), proposed as §115.544(b)(3), requires the VOC concentration to be monitored once per minute for at least five minutes, and all measurements must be less than the VOC concentration limits in §115.542(b). The commission is adopting this language to clarify the monitoring procedure that should be used to determine the VOC concentration prior to venting the tank or vessel to the atmosphere without control for the remainder of the degassing operation. The commission is adopting this procedure to increase consistency between this rule and the Refinery MSS Model Permit. In response to comments, the commission is also adopting §115.544(b)(3)(B) to allow the VOC concentration to be monitored over a five-minute period using the integrated bag sampling procedure in Method 18 (40 CFR Part 60, Appendix A) §§8.2.1.1 - 8.2.1.4 and the integrated measurement must be less than the VOC concentration limits in §115.542(b). The commission is adopting this alternative monitoring option as an equivalent procedure to the monitoring option in adopted §115.544(b)(3)(A). As adopted, §115.544(b)(3)(B) would allow the use of integrated bag sampling for determining the VOC concentration for the purposes of either the 34,000 ppmv, expressed as methane or the 50% of the LEL limit.

Adopted §115.544(b)(4) requires the owner or operator of any storage tank, transport vessel, or marine vessel to comply with one of the conditions in this paragraph after demonstrating compliance with the applicable VOC concentration or percent LEL limits in §115.542(b) or (c) in accordance with paragraph (3). The existing rule requires affected owners or operators to monitor a tank or vessel for 48 hours after reaching the applicable VOC concentration or percent LEL limits. The commission is expanding this option to all areas affected by this rulemaking as well as providing additional options.

Adopted §115.544(b)(4)(A) allows the VOC concentration inside the tank or vessel to be monitored once every 12 hours while venting to the atmosphere without control until five consecutive measurements collected at 12-hour intervals are measured to be less than 34,000 ppmv or less than 50% of the LEL. The VOC concentration measurement required by paragraph (3) may be considered the first of these five consecutive measurements. Adopted clause (i) specifies that if venting to the atmosphere without control has been suspended for more than four hours, the VOC concentration inside the tank or vessel must be measured upon restart of the degassing operation. For consistency, adopted clause (i) was revised from proposal to read *venting to the atmosphere without control instead of uncontrolled venting to the atmosphere.* Adopted clause (ii) specifies that if any of the VOC concentration measurements equal or exceed 34,000 ppmv, expressed as methane or 50% of the LEL, the tank or vessel must be routed to the control device until the VOC concentration is below 34,000 ppmv, expressed as methane or less than 50% of the LEL as determined by subsection (b)(3). Adopted subparagraph (A) contains the existing requirements in §115.542(a)(6) and (b)(5) for the Houston-Galveston-Brazoria area and applies this same requirement to all affected areas. In response to comments, the commission is also adopting clause

(iii) to specify that if the measured VOC concentration is less than 6,800 ppmv, expressed as methane or 10% of the LEL then no further VOC concentration measurements are required. The commission is adopting this option based on the premise that once the VOC concentration inside the tank or vessel is less than 1/5 of the standard it will not be possible for the VOC concentration to rise above 34,000 ppmv, expressed as methane or 50% of the LEL.

Adopted §115.544(b)(4)(B) allows the storage tank, transport vessel, or marine vessel to be vented to the atmosphere without control for the remainder of the degassing operation with no further VOC measurements if the VOC concentration inside the tank or vessel is less than 6,800 ppmv, expressed as methane or 10% of the LEL before the owner or operator stops routing the VOC vapors to a control device in accordance with §115.541 and §115.542. Proposed subparagraph (B) would have required the VOC concentration inside the tank or vessel to be less than 1% of the LEL before the owner or operator stops routing the VOC vapors to a control device in accordance with §115.541 and §115.542. However, in response to comments, the commission is adopting a threshold of 6,800 ppmv, expressed as methane or 10% of the LEL, based on the premise that once the VOC concentration inside the tank or vessel is less than 1/5 of the standard it will not be possible for the VOC concentration to rise above 34,000 ppmv, expressed as methane or 50% of the LEL within the first 12 hours after disconnecting the control device.

The commission is not adopting the option proposed in §115.544(b)(4)(C) that would have allowed the owner or operator to use the procedure in this subparagraph to demonstrate that the VOC concentration inside the tank or vessel will not increase above the applicable concentration limit in §115.542(b) or (c) before venting the tank or vessel to the atmosphere for the remainder of the degassing operation. As discussed in the RESPONSE TO COMMENTS section of this preamble, the commission is not adopting this proposed option because this proposed procedure may not guarantee that the VOC concentration will not rise above 34,000 ppmv, expressed as methane.

In response to comments, the commission is adopting §115.544(b)(5) specifying that minor modifications to the monitoring methods may be approved by the executive director and that monitoring methods other than those specified in this subsection may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Method 301. The commission is adopting this provision to provide additional flexibility to affected owners or operators.

Also, in response to comments, the commission is adopting §115.544(b)(6) to clarify that the sampling location for performing the monitoring required by §115.544(b)(3) may be immediately before the control device, in the transfer line from the tank or vessel to the control device, or in the vapor space of the tank or vessel provided it is representative of the concentration of VOC entering the control device.

The commission adopts §115.544(c) to specify the testing requirements that apply to the owner or operator of any storage tank, transport vessel, or marine vessel subject to this division if a control device is used to comply with the emission specifications in §115.541.

Adopted §115.544(c)(1) requires an initial control efficiency demonstration to be conducted in accordance with the approved test methods in §115.545 for a control device used to comply with the requirements in §115.542(a)(1). Proposed paragraph (1) would have required the device to be retested within 60 days after any modification that could reasonably be expected to affect the efficiency of a control device. However, in response to comments, adopted paragraph (1) requires the device to be retested after any modification that could reasonably be expected to decrease the efficiency of a control device within 60 days after the modification or before being used to comply with the requirements in §115.542(a)(1), whichever is longer. The commission is clarifying that the retest is only required if the modification would decrease the control efficiency of the device. The commission is also providing additional time to conduct the required retesting for control devices that are not consistently used to comply with the requirements in §115.542(a)(1).

Adopted §115.544(c)(2) requires a periodic control efficiency demonstration to be conducted at least once every 60 months in accordance with the approved test methods in §115.545 for a portable control device used to comply with the requirements in §115.542(a)(1).

Adopted §115.544(c)(3) exempts a portable thermal oxidizer or vapor combustor used to comply with the requirements in §115.542(a)(1) from the periodic control efficiency demonstration in paragraph (2) if the combustion chamber temperature is at least 1,400 degrees Fahrenheit and the flow rate of the VOC vapors routed to the device is limited to assure at least a 0.5 second residence time all times when the device is in use. In response to comments, adopted paragraph (3) is revised from proposal to apply the requirements proposed for thermal oxidizers to both thermal oxidizers and vapor combustors.

Section 115.545, Approved Test Methods

The commission adopts the repeal of existing §115.545 in order to reformat and clarify the approved test methods in this division. The existing requirements in this section are being incorporated into adopted new §115.545.

The commission adopts new §115.545 to indicate that compliance with the requirements in this division must be determined by applying one or more of the following test methods or procedures, as appropriate. Adopted new §115.545 amends the existing language in §115.545 to improve consistency with other rules in Chapter 115 and to more clearly indicate that the test methods listed in this section must be used to demonstrate compliance with all the requirements in this division not just the requirements in §115.541 and §115.542.

Adopted new §115.545(1) requires the use of Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rates. Adopted new paragraph (1) contains the same requirement in existing paragraph (1) with non-substantive changes necessary to comply with current rule formatting standards.

Adopted new §115.545(2) allows for the use Methods 3, 3A, or 3B (40 CFR Part 60, Appendix A) to determine exhaust gas oxygen concentration for making any oxygen corrections necessary for §115.541(a)(4).

Adopted new §115.545(3) allows the use of Method 18 (40 CFR Part 60, Appendix A) for determining gaseous organic compound emissions by gas chromatography. Adopted new paragraph (3) incorporates the requirement in existing paragraph (2) with non-substantive changes necessary to comply with current rule formatting standards. Adopted new subparagraph (A) requires only one bag sample to be collected for each concentration measurement if Method 18 is used to demonstrate compliance with the VOC concentration monitoring requirements in §115.542(b) and

§115.544(b)(4). Adopted new subparagraph (A) contains the same requirement in existing paragraph (11)(B) for use in the Houston-Galveston-Brazoria area. The adopted rule allows only one bag sample to be collected for each concentration measurement if Method 18 is used for demonstrating compliance with the VOC concentration monitoring requirements in all areas affected by the rule. Adopted new subparagraph (B) requires the VOC concentration to be determined by using the integrated bag sampling procedure in Method 18, §§8.2.1.1 - 8.2.1.4 if Method 18 is used to demonstrate compliance with the VOC concentration monitoring requirements in §115.544(b)(2)(F) for an internal combustion engine or any control device used to comply with the option in §115.542(a)(4) to limit exhaust concentration. Adopted new subparagraph (B) was revised from proposal to remove the reference to the hourly VOC concentration measurements since this requirement was amended in response to comments.

Adopted new §115.545(4) allows for the use Method 19 (40 CFR Part 60, Appendix A) for determining exhaust gas flow rates on combustion control devices in lieu of using Methods 1 - 4.

Adopted new §115.545(5) allows Method 21 (40 CFR Part 60, Appendix A-7) to be used for determining VOC leaks. This portion of adopted new paragraph (5) contains the same requirement in existing paragraph (6). Adopted new paragraph (5) also allows an instrument meeting the specifications and calibration requirements in Method 21 to be used for demonstrating compliance with the VOC concentration monitoring requirements in §115.542(b) and §115.544(b)(3) and (4) with the provision that the instrument response factor criteria in §8.1 of Method 21 may be determined using the average composition of the liquid in the tank rather than for each individual liquid. This portion of adopted new paragraph (5) contains the same requirement in existing paragraph (11)(A) for use in the Houston-Galveston-Brazoria area. The commission is allowing the use of an instrument meeting the specifications and calibration requirements in Method 21 for demonstrating compliance with the VOC concentration monitoring requirements in all areas affected by the rule.

Adopted new §115.545(6) allows Method 25 (40 CFR Part 60, Appendix A) to be used for determining total gaseous nonmethane organic emissions as carbon. Adopted new paragraph (6) contains the same requirement in existing paragraph (3).

Adopted new §115.545(7) allows Methods 25A or 25B (40 CFR Part 60, Appendix A) to be used for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis. Adopted new paragraph (7) contains the same requirement in existing paragraph (4).

Adopted new §115.545(8) allows Method 27 (40 CFR Part 60, Appendix A) to be used for determining tank-truck leaks. Adopted new paragraph (8) contains the same requirement in existing paragraph (8).

Adopted new §115.545(9) allows for the use of a portable oxygen analyzer that is calibrated, maintained, and operated according to the manufacturer's instructions to determine exhaust gas oxygen concentration for making any oxygen corrections necessary for §115.542(a)(4) in lieu of using Methods 3, 3A, or 3B.

Adopted new §115.545(10) allows additional test procedures described in 40 CFR §60.503(b) - (d) (effective February 14, 1989) to be used for determining compliance for bulk gasoline terminals. Adopted new paragraph (10) contains the same requirement in existing paragraph (5).

Adopted new §115.545(11) requires the true vapor pressure to be determined using standard reference texts or American Society for Testing and Materials Test Method D323-89, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for actual storage temperature in accordance with American Petroleum Institute Publication 2517, Third Edition, 1989. Adopted new paragraph (11) contains the same requirement in existing paragraph (7) with the following additions. In response to comments, the commission has also added the option to use standard reference texts to determine the true vapor pressure. Adopted new paragraph (11) also includes new language to clarify that for the purposes of temperature correction, the owner or operator shall use the actual storage temperature. In response to comments, the commission is not adopting the proposed requirement that for the purposes of temperature correction, the owner or operator shall use the higher of either 95 degrees Fahrenheit or the actual storage temperature. Adopted new paragraph (11) allows the actual storage temperature of an unheated tank or vessel to be determined using the maximum local monthly average ambient temperature as reported by the National Weather Service. Adopted new paragraph (11) also allows the actual storage temperature of a heated tank or vessel to be determined using either the measured temperature or the temperature set point of the tank or vessel.

Adopted new §115.545(12) allows the test procedures in 40 CFR §63.565(c) or 40 CFR §61.304(f) to be used for determination of marine vessel vapor tightness. Adopted new paragraph (12) contains the same requirement in existing paragraph (9).

Adopted new §115.545(13) allows LEL detectors to be used for the concentration measurement required by §115.542(b) and §115.544(b)(3) and (4), if the detector is calibrated and maintained according to manufacturer's specifications. Adopted new paragraph (13) contains the same requirement in existing paragraph (11)(F) for use in the Houston-Galveston-Brazoria area and allows the use of LEL detectors for required concentration measurements in all areas affected by the rule.

Adopted new §115.545(14) allows minor modifications to the test methods in this section to be used if approved by the executive director. Adopted new paragraph (14) contains the same requirement in existing paragraph (10).

Adopted new §115.545(15) allows test methods other than those specified in this section to be used if validated by 40 CFR Part 63, Appendix A, Test Method 301 and approved by the executive director. Adopted new paragraph (15) establishes consistency in the rules by providing an affected owner or operator with the same flexibility afforded to the owner or operator of other units regulated in Chapter 115.

The commission is deleting the option in existing paragraph (11)(C) to use bag samples to measure the VOC concentration in the Houston-Galveston-Brazoria area, if the means of collecting the sample and the type of bag used are appropriate and representative of the type of space being sampled and the analytical method used to evaluate bag contents are appropriate for the concentration levels and compound types. The commission is removing this option because it does not provide enough specificity to ensure the appropriate use of this sampling method.

The commission is deleting the option in paragraph (11)(E) to use portable hydrocarbon gas analyzer using an appropriate detector that is effective in the concentration range being measured and calibrated with compounds of interest in each case if the

analyzer is calibrated and maintained according to the manufacturer's specifications. The commission is removing this option because it does not provide enough specificity to ensure the use of appropriate instruments. The commission contends that the use of an instrument meeting the specifications in Method 21 is more appropriate for demonstrating compliance with the VOC concentration monitoring requirements.

Section 115.546, Recordkeeping and Notification Requirements

The commission is changing the title of §115.546 from *Monitoring and Recordkeeping Requirements to Recordkeeping and Notification Requirements* to reflect the adopted changes to the content of this section to relocate the monitoring requirements to §115.544 and to require notification of degassing operations.

Adopted §115.546(a) specifies the recordkeeping requirements for this division. Adopted subsection (a) incorporates the existing requirements in §115.546 for the owner or operator of any VOC storage tank, transport vessel, or marine vessel subject to the requirements in this division to maintain records on site for at least two years and make these records available upon request to authorized representatives of the executive director, the EPA, or any local air pollution control agency with jurisdiction. In addition, the commission is changing the record retention time from two years to five years for all records created on or after March 1, 2009. The commission is increasing the record retention time from two years to five years because the commission anticipates that most of the facilities subject to this division are already required to keep records for five years to comply with their Title V permit requirements. The new five-year record retention time only applies to those records generated after or during the time period two years before the effective date of the adopted rule.

The commission is relettering the existing requirements in §115.546(1), (1)(A) - (C) as §115.546(a)(1), (a)(1)(A) - (C), respectively, with non-substantive changes necessary to comply with current rule formatting standards.

Adopted §115.546(a)(1)(D) requires the affected owner or operator to keep records of the VOC concentration or percent LEL measurements required in §115.544(b)(3) to determine when the storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control. Adopted subparagraph (D) clarifies the intent of the existing requirement in §115.546(4) to maintain results of any testing conducted in accordance with the provisions specified in §115.545 includes maintaining records to demonstrate compliance with the VOC concentration limits in §115.542.

Adopted §115.546(a)(1)(E) requires records of the VOC concentration or percent LEL measurements required in §115.544(b)(4). Adopted subparagraph (E) includes the requirements in existing §115.546(1)(D) for affected sources in the Houston-Galveston-Brazoria area and also reflects the adopted revision to include this same monitoring requirement for all affected areas subject to this division.

Adopted §115.546(a)(2) requires the owner or operator to maintain records of any operational parameter monitoring required in §115.544(b)(2) for a control device used to comply with the requirements in this division.

Adopted §115.546(a)(2)(A) requires the owner or operator to maintain records of the VOC concentration measurements required in §115.544(b)(2)(A) for a carbon adsorption system. Adopted subparagraph (A) contains the existing requirements in §115.546(2)(C).

Adopted §115.546(a)(2)(B) requires the owner or operator to maintain records of the continuous monitoring of the inlet and outlet gas temperature of a catalytic incinerator required in §115.544(b)(2)(B). Adopted subparagraph (B) contains the same requirements in existing §115.546(2)(B).

Adopted §115.546(a)(2)(C) requires the owner or operator to maintain records of the continuous monitoring of the outlet gas temperature to ensure that the temperature is below the manufacturer's recommended operating temperature for controlling the VOC vapors that are routed to a condensation system as required in §115.544(b)(2)(C).

Adopted §115.546(a)(2)(D) requires the owner or operator to maintain records of the continuous monitoring of the exhaust gas temperature immediately downstream of a direct-flame incinerator as required in §115.544(b)(2)(D). Adopted subparagraph (D) contains the same requirements in existing §115.546(2)(A).

Adopted §115.546(a)(2)(E) requires the owner or operator to maintain records of the continuous monitoring of the net heating value of the VOC vapors routed to the flare, the supplemental fuel added to the VOC vapors routed to the flare, or the engineering calculations required in §115.544(b)(2)(E).

Adopted §115.546(a)(2)(F) requires the owner or operator to maintain records of the monitoring of the exhaust gas VOC concentration required in §115.544(b)(2)(F) for any control device used to comply with the option in §115.542(a)(4) to limit exhaust concentration. As discussed in the RESPONSE TO COMMENTS portion of this preamble, the commission is not adopting this requirement for internal combustion engines. Adopted subparagraph (F) also requires records of the monitoring method used to determine the VOC concentration.

Adopted §115.546(a)(2)(G) requires the owner or operator to maintain records of the continuous monitoring of the combustion chamber temperature of a thermal oxidizer or vapor combustor as required in §115.544(b)(2)(G). Adopted subparagraph (G) also requires the owner or operator to maintain records of the continuous monitoring of the gas flow rate into the thermal oxidizer or vapor combustor to determine the residence time if necessary to demonstrate compliance with §115.544(c)(3). In response to comments, adopted subparagraph (G) was revised from proposal to apply the requirements proposed for thermal oxidizers to both thermal oxidizers and vapor combustors.

Adopted §115.546(a)(2)(H) requires the owner or operator to maintain records of the continuous monitoring of the pressure inside the tank or vessel or the continuous monitoring of the gas flow rate at the inlet and outlet as required in §115.544(b)(2)(H) if a recirculation system is used to comply with this division. Adopted subparagraph (H) also requires the owner or operator to maintain records of the Method 21 monitoring for VOC leaks within one hour after beginning any degassing operation, including the VOC measurements and the time the monitoring began.

In response to comments, the commission is adopting §115.546(a)(2)(I) requiring the owner or operator to maintain records of the continuous engine exhaust gas oxygen content monitoring required in §115.544(b)(2)(I) if an internal combustion engine is used to comply with this division.

In response to comments the commission is adopting §115.546(a)(2)(J) requiring the owner or operator to maintain records of the continuous operational parameter monitoring required in §115.544(b)(2)(J) sufficient to demonstrate proper functioning of the control device not listed in this paragraph.

The commission is amending §115.546(a)(3) with non-substantive changes necessary to comply with current rule formatting standards. The adopted amendment to paragraph (3) also indicates the commission is relettering the inspection requirements in §115.544 as §115.544(a).

The commission is amending §115.546(a)(4) with non-substantive changes necessary to comply with current rule formatting standards. The adopted amendment to paragraph (4) also requires the records to contain all applicable requirements from the commission's *Sampling Procedures Manual, Chapter 14.0, Contents of Sampling Reports* (January 2003, revision one). The commission adopts this recordkeeping requirement to clarify what information the commission expects to be included in the records of any testing conducted in accordance with the approved test methods in §115.545.

Adopted §115.546(a)(5) requires the owner or operator to maintain records of the manufacturer's instructions for installation, calibration, maintenance, and operation for any monitoring device used to comply with the requirements in this division.

Adopted §115.546(b) requires that upon request by authorized representatives of the executive director, the owner or operator of a storage tank, transport vessel, or marine vessel in the Houston-Galveston-Brazoria area to notify the appropriate regional office of upcoming degassing operations. The adopted notification requirements facilitate the enforcement of the rule by allowing investigators to observe degassing operations.

Section 115.547, Exemptions

The commission adopts non-substantive changes to §115.547 necessary to comply with current rule formatting standards.

The commission is deleting existing language in paragraph (1) to clarify the rule applicability, the commission adopts that this division apply to any storage tank, transport vessel, or marine vessel storing VOC liquids with a true vapor pressure greater than or equal to 0.5 psia under actual storage conditions. The commission is removing the exemption in existing paragraph (1) because it is no longer necessary to exempt any storage tank, transport vessel, or marine vessel storing VOC liquids with a vapor space partial pressure less than 0.5 psia under actual storage conditions.

Adopted §115.547(1) contains the portions of existing paragraph (2) that relate to storage tanks. Adopted paragraph (1) specifies that any storage tank with a storage capacity of less than one million gallons is exempt from this division. Adopted paragraph (1) also indicates that after January 1, 2009, in the Houston-Galveston-Brazoria area, the storage tanks listed in subparagraphs (A) and (B) are no longer exempt from the requirements of this division. Adopted subparagraph (A) clarifies that storage tanks in the Houston-Galveston-Brazoria area with a storage capacity greater than or equal to 250,000 gallons but less than one million gallons are no longer exempt from this division after January 1, 2009. Adopted subparagraph (B) clarifies that storage tanks in the Houston-Galveston-Brazoria area with a storage capacity greater than or equal to 75,000 gallons but less than 250,000 gallons storing materials with true vapor pressure greater than 2.6 psia are no longer exempt from this division after January 1, 2009.

Adopted §115.547(2) exempts any transport vessel in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas with a storage capacity of less than 8,000 gallons from the requirements in this division. Adopted paragraph (2) contains the portions of existing paragraph (2) that relate to transport vessels.

Adopted §115.547(3) exempts any marine vessel in the Beaumont-Port Arthur and Houston-Galveston-Brazoria areas with a storage capacity of less than 420,000 gallons from the requirements in this division. Adopted paragraph (3) contains the portions of existing paragraph (2) that relate to marine vessels. The commission is deleting the reference to 10,000 barrels in the existing rule to be consistent with the format of the other exemptions in this section that do not include references to the equivalent value in barrels.

The commission is renumbering the requirement in existing paragraph (3) as adopted §115.547(4) with only non-substantive changes necessary to comply with current rule formatting standards.

The commission is renumbering the requirement in existing paragraph (4) as adopted §115.547(5) with non-substantive changes necessary to comply with current rule formatting standards. The commission also amends existing paragraph (4) to indicate that requirements in existing §115.541(b) and §115.542(b) are adopted as §115.541 and §115.542. In addition, adopted paragraph (5) limits this exemption to only apply for 30 calendar days after the damage to the cargo tank is sustained. The commission is adopting this new limit to minimize emissions from damaged marine vessels.

The commission is renumbering the requirement in existing paragraph (5) as adopted §115.547(6) with only non-substantive changes necessary to comply with current rule formatting standards.

Section 115.549, Compliance Schedules

The commission is changing the title of §115.449 from *Counties and Compliance Schedules to Compliance Schedules* to establish consistency with other Chapter 115 rules.

Adopted §115.549(a) states that affected owners or operators in Brazoria, Chambers, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, and Waller Counties were required to be in compliance with this division by November 15, 1996, and shall continue to comply with this division. The existing subsection (a) states that all affected persons shall continue to comply with this division as required by §115.930. Section 115.930 indicates that for all counties affected by this chapter, the final compliance dates for revisions to control requirements are given within the section relating to counties and compliance schedules in each division if the final compliance date of any provision is after the date of adoption of the current revision to this chapter; if the compliance dates are not specified for any provision, the compliance date is past and all affected persons must be and remain in compliance with the provision as of the original compliance date. Adopted subsection (a) establishes consistency with other rules in Chapter 115 and improves the readability of the rule by clearly indicting the compliance schedule in the same portion of Chapter 115.

Adopted §115.549(b) indicates that all affected owners or operators in Collin, Dallas, Denton, and Tarrant Counties shall be in compliance with this division as soon as practicable, but no later than May 21, 2011. The adopted change reflects the rule compliance date for these counties that was recently published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 4268) based on the commission's determination that this contingency rule is necessary as a result of failure to attain the NAAQS for

ozone by the attainment deadline. In response to comments, the commission is also allowing the owner or operator to delay compliance with the requirements in §115.544(b)(2)(E) until March 1, 2012, if compliance with this provision requires the installation of additional monitoring equipment. The March 1, 2012, compliance date is approximately one year after the effective date of this rule revision. Until the monitoring equipment necessary to demonstrate compliance with the requirements in §115.544(b)(2)(E) is installed, the owner or operator shall demonstrate compliance by using engineering calculations or other available monitoring or testing data.

The commission adopts non-substantive changes to subsection (c) necessary to comply with current rule formatting standards.

The commission adopts non-substantive changes to subsection (d) necessary to comply with current rule formatting standards. The commission also adopts amending subsection (d) to indicate that requirements in existing §115.542(a)(6) and (b)(5), and §115.546(1)(D) are adopted as §§115.542(b), 115.544(b)(4), and 115.546(a)(1)(E), respectively. The commission revised subsection (d) from proposal to include the accurate section references. In response to comments, the commission is also allowing the owner or operator to delay compliance with the requirements in §115.544(b)(2)(E) until March 1, 2012, if compliance with this provision requires the installation of additional monitoring equipment. The March 1, 2012, compliance date is approximately one year after the effective date of this rule revision. Until the monitoring equipment necessary to demonstrate compliance with the requirements in §115.544(b)(2)(E) is installed, the owner or operator shall demonstrate compliance by using engineering calculations or other available monitoring or testing data.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the adopted repeal, new sections, and amendments to Chapter 115 are intended to protect air quality in ozone nonattainment areas, they are not expected to have any material adverse affects on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Instead, the adopted rules are intended to clarify the requirements for degassing of stationary storage tanks, transport vessels, or marine vessels during the process of cleaning. The adopted rules address concerns identified by affected industries and other stakeholders about potentially confusing rule requirements and will facilitate compliance and enforcement of the degassing requirements. Additionally, the adopted rulemaking also does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The degassing requirements are designed to control sources of VOC, a precursor of ozone. The adopted rules will apply in the ozone nonattainment areas of Houston-Galveston-Brazoria and Beaumont-Port Arthur. The current degassing requirements were triggered as a contingency measure by the commission on May 21, 2010, requiring Dallas, Denton, Collin, and Tarrant Counties to become compliant with the current rules as expeditiously as practical, but no later than one year after the date that the contingency measures were triggered. The one-year period to allow facilities to come into compliance in the rules provides a period of time for facilities to make necessary preparations to meet the monitoring and control requirements of the current rules. The adopted rulemaking is not intended to impose more stringent requirements than the existing rules. Therefore, the adopted rulemaking will be effective in Dallas, Denton, Collin, and Tarrant Counties as expeditiously as practical after the effective date of the rule, but no later than May 21, 2011. The rules may also potentially become effective in El Paso should they be triggered as contingency measures in the future. The intent of the adopted rulemaking is to clarify the rule requirements, including requirements for testing and sampling, to provide for the use of alternative control equipment, to improve consistency with the new Refinery MSS Model Permit, and implement requirements for the notification of degassing activities.

The adopted rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the Federal Clean Air Act (FCAA) recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. The intent of the adopted rulemaking is to clarify the rule requirements, including requirements for testing and sampling, to provide for the use of alternative control equipment, to improve consistency with the new Refinery MSS Model Permit, and implement requirements for the notification of degassing activities. The adopted rulemaking will facilitate compliance and enforcement of the degassing requirements in ozone nonattainment areas. These requirements are control measures for VOC, a precursor of ozone, and are essential for attainment and maintenance of the ozone NAAQS.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As previously discussed in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967); Dudney v. State Farm Mut. Auto Ins. Co., 9 S.W.3d 884, 893 (Tex. App. Austin 2000); Southwestern Life Ins. Co. v. Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and Coastal Indust. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." The adopted rules will clarify the requirements for degassing of stationary storage tanks, transport vessels, or marine vessels during the process of cleaning, with the specific intent of facilitating compliance and enforcement of the degassing requirements in ozone nonattainment areas. These requirements are control measures for VOC, a precursor of ozone, and are essential for attainment and maintenance of the ozone NAAQS. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code, §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission received one comment on the draft regulatory impact analysis from Texas Terminal Operators Group (TTOG), which stated that the proposed rule change to §115.541(f) would be significantly more stringent than the current rules, despite the stated intent of the commission, and the draft regulatory impact analysis. The commission respectfully disagrees, and no changes have been made to the regulatory impact analysis in response to this comment, although §115.541(f) has been revised. Although TTOG states that the new rules will be more stringent than existing rules, the only support offered for this statement is that the rule will be contrary to existing New Source Review (NSR) permit requirements, and that the requirement is neither stated by nor implicit in the current rules. However, the commission is including a strict time limit to clarify when degassing must start, as the lack of specific time in the existing rules can imply that degassing must start immediately. In the absence of clear regulatory language, an owner or operator that fails to begin the degassing operations immediately may be subject to enforcement action by the region. Conversely, the lack of rule language regarding a specific time to begin degassing could lead to increased emissions of air pollutants, while a tank or vessel sits for an extended period of time without undergoing degassing. The commission's intent with the current rulemaking is to clarify potentially confusing rule requirements and facilitate compliance and enforcement of the degassing requirements, as stated in the draft regulatory impact

analysis. The addition of a specific time frame under which an owner or operator shall begin degassing provides clarity to the rule and facilitate both compliance by affected sources and enforcement by the regional offices. However, because the commission acknowledges that the Chapter 116 permit review process is designed to develop requirements for facilities on a case-by-case basis that evaluates specific circumstances particular to a specific facility, the commission has revised the rule to add §115.541(f)(3), which allows a facility the option to begin degassing on a schedule specified within a Chapter 116 permit, up to a maximum of 72 hours.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The degassing requirements are designed to control sources of VOC, a precursor of ozone, to ensure attainment and maintenance of the ozone NAAQS. The adopted rules will apply in the Houston-Galveston-Brazoria and Beaumont-Port Arthur areas. The current degassing requirements were triggered as a contingency measure by the commission on May 21, 2010, requiring Dallas, Denton, Collin, and Tarrant Counties to become compliant with the current rules as expeditiously as practical, but no later than one year after the date that the contingency measures were triggered. The one-year period to allow facilities to come into compliance in the rules provides a period of time for facilities to make necessary preparations to meet the monitoring and control requirements of the current rules. The adopted rulemaking is not intended to impose more stringent requirements than the existing rules. Therefore, the adopted rulemaking will be effective in Dallas, Denton, Collin, and Tarrant Counties as expeditiously as practical, but no later than May 21, 2011. The rules may also potentially become effective in El Paso, should they be triggered as contingency measures in the future. The intent of the adopted rulemaking is to clarify the rule requirements, including requirements for testing and sampling, to provide for the use of alternative control equipment, to improve consistency with the new Refinery MSS Model Permit, and implement requirements for the notification of degassing activities. The adopted rulemaking clarifies requirements that help to ensure the attainment and maintenance of the ozone NAAQS. Therefore, Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The specific intent of the adopted rulemaking is to facilitate compliance and enforcement of the degassing requirements in the ozone nonattainment areas. These requirements are control measures for VOC, a precursor of ozone, and are essential for attainment and maintenance of the ozone NAAQS.

Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the adopted rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to the adopted rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). The adopted rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency with the coastal management program.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. If the revisions to Chapter 115 are adopted, owners or operators subject to the federal operating permit program shall, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 115 requirements.

PUBLIC COMMENT

The commission scheduled public hearings on this proposal on September 7, 2010, at 10:00 a.m. at the Texas Commission on Environmental Quality, in Austin; on September 8, 2010, at 2:00 p.m. at the Houston-Galveston Area Council in Houston; and on September 9, 2010, at 2:00 p.m. at the Texas Commission on Environmental Quality, Region 4 Office, in Fort Worth. The public hearings were not officially opened because no party indicated a desire to provide comment.

The commission received written comments from Green Environmental Consulting, Incorporated (Green Environmental), Johann Haltermann Limited (Johann Haltermann), Kinder Morgan Energy Partners, Limited Partnership (Kinder Morgan), NanoVapor Fuel Group (NanoVapor), ProAct Services Corporation (ProAct), Remediation Service International (RSI), Texas Chemical Council (TCC), TTOG, Texas Oil and Gas Association (TxOGA), and the EPA.

The commentors suggested modifications to the proposed rules as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General Comments

Comment

TTOG expressed the support for the commission's efforts to clarify existing rule requirements and to facilitate compliance flexibility.

Response

The commission appreciates the support.

Comment

TxOGA supported development of a registration or certification program or a portable facility permit for approved portable degassing equipment to ensure and demonstrate compliance. TxOGA commented that some compliance issues are related to the owner or operator of the portable degassing equipment and beyond the control of the regulated owner or operator.

TCC commented that performing and documenting compliance demonstrations for contracted control devices should be the responsibility of the contractor operating the control device. TCC stated this would be analogous to gasoline tank trucks for which the owner or operator of the tank trucks is responsible for performing and documenting tests of the tank trucks, and the responsibility of the facility is to obtain and keep a copy of the documentation a laboratory accreditation under the auspices of EPA National Environmental Laboratory Accreditation Conference. TCC commented that in a similar manner, performance and records of stack tests should be the responsibility of the control device owner or operator and not of the facility; the facility owner should be required only to obtain and maintain copies of the documentation.

Response

No changes were made in response to these comments. Compliance with applicable rules is the responsibility of the affected owner or operator even if the work is performed by a third-party contractor. Additionally, the existing rules and the changes that were proposed only apply to the owner or operator performing or outsourcing the degassing operations that occur during cleaning or in preparation of cleaning a storage tank, transport vessel, or marine vessel. Third-party contractors that are hired by the owner or operator to perform degassing services are not directly subject to the rule. Applying the rule to these third-party contractor companies directly would be an expansion of the rule and could also necessitate enforceable provisions that are not currently included in the rule nor proposed with this rulemaking.

Comment

TxOGA and TCC commented that the commission should provide an option to use low vapor pressure liquid to comply with the requirements of this division. TxOGA requested that the rule be revised to include an alternative for using low vapor pressure product to reduce the tank vapor pressure to less than 0.5 psia. TCC suggested allowing distillate flooding because the approach absorbs VOC vapors rather than expelling them and pollution prevention methods should be favored over capture-and-control methods. TCC commented that the distillate flooding procedure should reduce degassing emissions at least as effectively as the procedures presently proposed and will prevent unnecessary pollution. TCC commented that distillate flooding avoids generation of secondary emissions and is not dependent on the proper functioning of mechanical systems.

Response

No changes were made in response to these comments. When low vapor pressure liquid is added to the tank or vessel, VOC vapors inside the tank or vessel will be displaced by the liquid volume introduced and will generate spikes of VOC emissions if those emissions are not routed to a control device. The adopted degassing rules do not prohibit distillate flooding or water washing the tank or vessel while the VOC vapor is routed to a control device. The commission does not have sufficient technical data to support the benefits of using the low vapor pressure liquid for degassing if the VOC vapors generated from introducing the liquid are not routed to a control device. The commission may consider the application of low vapor pressure liquid as an alternative in a future rulemaking if more technical data becomes available.

Comment

Kinder Morgan requested the TCEQ determine if there would be any new requirements to its El Paso Break-Out Facility above and beyond existing requirements under the current attainment status or if the attainment status of El Paso changes in the future.

Response

No changes were made in response to this comment. Compliance with the requirements in this division is not currently required in El Paso County. As stated in §115.549(c), affected sources in El Paso County must be in compliance with this division as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the 1990 amendments to FCAA, §172(c)(9). Additionally, this rule is currently a contingency measure for the one-hour ozone NAAQS. Compliance with the rule would not need to be triggered if the El Paso area is designated as nonattainment for a later ozone standard. If the commission publishes notice in the *Texas Register* then affected sources in El Paso would be required to comply with the applicable requirements in this division. However, Kinder Morgan did not provide sufficient information for the commission to determine if its specific facilities would be affected should the rules be triggered in El Paso County.

Section 115.540, Applicability and Definitions

Comment

TTOG expressed support for the applicability requirement in §115.540(a) clarifying that the degassing rules only apply to degassing during, or in preparation of, cleaning operations.

Response

The commission appreciates the support.

Comment

EPA commented that the rule language in §115.540(a) appears to limit applicability to degassing in preparation for or during cleaning. EPA indicated that it is not clear why the applicability should be limited to just degassing for these reasons since tanks could potentially be degassed for other reasons. EPA recommended modifying the rule applicability in §115.540(a) to apply to the degassing or cleaning of any storage, transport

vessel, or marine vessel containing VOC liquids with a true vapor pressure greater than or equal to 0.5 psia under actual storage conditions.

Response

No changes were made in response to this comment. The existing rules and the changes that were proposed only apply to degassing operations that occur during cleaning or in preparation of cleaning a storage tank, transport vessel, or marine vessel. The suggested change would expand the rule to apply to other operations and newly affected parties not included in the rule at proposal. Therefore, the commission is unable to make this change because these newly affected parties have not been given an opportunity to comment.

Comment

TxOGA suggested that §115.540(a) be revised to apply to the regulated entity performing the degassing or cleaning operation or the third-party contractor performing the degassing or cleaning operation.

Response

No changes were made in response to this comment. As discussed elsewhere in the RESPONSE TO COMMENTS section of this preamble, compliance with the rule is the responsibility of the owner or operator of the tank or vessel subject to the rules and making third-party contractors directly subject to the rule and applying any necessary additional requirements on these third parties would be an expansion of the rule. Therefore, the commission is unable to make this change because these newly affected parties have not been given an opportunity to comment on such substantive changes.

Comment

EPA commented that §115.540(a)(2) indicates that this division only applies to any storage tank or transport vessel in Collin, Dallas, Denton, and Tarrant Counties and encouraged the commission to consider adding the counties of Ellis, Johnson, Kaufman, Parker, and Rockwall to cover all nine counties in the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area.

Response

No changes were made in response to this comment. The existing rules and the changes that were proposed only apply to storage tanks and transport vessels in Collin, Dallas, Denton, and Tarrant Counties. Therefore, the commission is unable to make this change because newly affected sources in the five additional counties suggested by EPA would not have been given an opportunity to comment.

Comment

TCC commented that the definition of *Cleaning* in §115.540(b)(1) is overly broad in that it includes the removing of vapor as an activity that constitutes cleaning. TCC commented that under this definition, normal operations of a tank or vessel could be mistakenly construed as cleaning if those normal operations involve any release of vapors, such as the vapors displaced by incoming liquid during loading. TCC suggested revising the definition to eliminate the potential for confusion by simply striking the word vapor from the definition of cleaning.

TTOG commented that because the term *Cleaning* is not defined by the current rules, it should be given its customary meaning, which does not include removal of vapors. TTOG commented that by expanding the meaning of *Cleaning* in §115.540(b)(1) to include degassing, the rules would seem to apply to all degassing operations, rather than merely degassing operations during or in preparation of true cleaning.

TxOGA commented that the definition of *Cleaning* in §115.540(b)(1) is important because it determines rule applicability for this rule and added that it is important not to define the term so broadly as to affect activities that should not be subject to this regulation. TxOGA suggested that removal of vapors should be deleted from the definition of *Cleaning.*

Response

The commission agrees with the commentors and has revised the definition of *Cleaning* in §115.540(b)(1) to exclude the removal of vapor. The original intent of the proposed definition was to include removal of vapors generated during the cleaning process. However, as discussed elsewhere in the RESPONSE TO COMMENTS section of this preamble, the commission is revising the definition of *Degassing* in §115.540(b)(2) to include the removal of vapors generated during, or in preparation of, cleaning. The revised definition of *Degassing* now includes the removal of vapors resulting from the cleaning process. Therefore, it is no longer necessary for the definition of *Cleaning* to include this activity.

Comment

TCC commented that the definition of *Degassing* in §115.540(b)(2) conflicts with the usage of that term in numerous regulations. TCC stated that EPA regulations use the term *emptied and degassed* to refer to a tank that has been cleaned and is gas-free, in the sense of being safe for personnel entry and therefore, in a suitable condition for an up-close inspection of the floating roof. TCC suggested that for consistency with federal rules, the term *Degassing* should be used only in the context of venting the tank for the purpose of cleaning, inspection, or maintenance. TCC commented that it is critical to explicitly state the link to cleaning in the definition, so as to avoid creating a definition of degassing that may unnecessarily confuse the requirements of existing regulations. TCC suggested revising §115.540(b)(2) to define *Degassing* as the process of removing VOC vapors during or in preparation for cleaning, maintenance, or inspection of a storage tank, transport vessel, or marine vessel.

TxOGA commented that the definition of *Degassing* in §115.540(b)(2) is important because it determines rule applicability for this rule and added that it is important not to define the term so broadly as to affect activities that should not be subject to this regulation. TxOGA commented that the definition of *Degassing* is not consistent with the usage of that term in federal rules such as New Source Performance Standards, Subpart Kb, where the phrase *emptied and degassed* refers to a tank that is clean and gas-free, safe for entry and up-close internal inspection. TxOGA suggested revising §115.540(b)(2) to define *Degassing* as the process of removing VOC in preparation of cleaning a storage tank, transport vessel, or marine vessel for maintenance or inspection.

Response

The commission agrees with the commentors and has revised the definition of *Degassing* in §115.540(b)(2) to include the removal of VOC vapors from a storage tank, transport vessel, or marine vessel during, or in preparation of, cleaning. In addition, the commission has revised the rule, including the title of Sub-

chapter F, Division 3, to only refer to emissions generated during the degassing process.

Section 115.541, Emission Specifications

Comment

TTOG commented that the proposed rule frequently uses the phrases *degassing and cleaning and degassing or cleaning* and suggested revising the rule to just use the term *degassing.*

Response

The commission agrees with the commentor and has made the suggested change. As discussed elsewhere in this preamble, in response to comments the commission has revised the definition of *Degassing* in §115.540(b)(2) and replaced phrases *degassing and cleaning and degassing or cleaning* with the term *degassing* throughout this division. In addition, the title of this division has been revised to Degassing of Storage Tanks, Transport Vessels, and Marine Vessels to reflect the change. These changes are intended to clarify the rule applicability.

Comment

EPA suggested using the phrase *degassing and cleaning* instead of *degassing or cleaning* in §115.541(a).

Response

No changes were made in response to this comment. As discussed elsewhere in this preamble, in response to comments the commission has revised the definition of *Degassing* in §115.540(b)(2) and replaced phrases *degassing and cleaning* and *degassing or cleaning* with the term *degassing* throughout this division. In addition, the title of this division has been revised to Degassing of Storage Tanks, Transport Vessels, and Marine Vessels to reflect the change. These changes are intended to clarify that the rule applies to degassing that occurs during, or in preparation of cleaning. The suggested change would expand the applicability of the existing rule and is outside the scope of the current revision.

Comment

TTOG commented that when the VOC concentration in a storage tank, transport vessel, or marine vessel meets the degassing specifications in §115.542(b) without use of a control device, the rule should clearly state that no control device needs to be used. TTOG suggested revising §115.541(a) to state that a control device need not be used if the VOC concentration inside the tank is less than 34,000 ppmv, expressed as methane or less than 50% of the LEL expressed as methane.

Response

The commission agrees with the commentor and has revised §115.541(a) to indicate that all VOC vapors must be routed to a control device unless the measured VOC concentration is less than 34,000 ppmv, expressed as methane or 50% of the LEL.

Comment

EPA commented that §115.541(b) should be revised to require visible and audible leaks be repaired before degassing continues with allowance for components under negative pressure.

Response

No changes were made in response to this comment. The commission respectfully disagrees with the suggested change. The inspection requirements in §115.544(a) do not require inspection for leaks using auditory means, and the suggested change would be inconsistent with the inspection requirements. The current inspection and monitoring requirements included in the adopted rule are sufficient to ensure proper operation of control equipment and detect any significant leaks. The commission also respectfully disagrees that the degassing process should be discontinued if a visible leak is detected if the leak is repaired as soon as possible. Such a requirement could require owner or operators to stop and restart degassing operations numerous times while degassing a tank or vessel to repair minor leaks, which could cause greater emissions than the repairs would prevent.

Comment

EPA suggested revising the requirement in §115.541(c) that no avoidable liquid or gaseous leaks, as detected by sight or sound, may originate from the degassing or cleaning operation. EPA suggested removing the word *avoidable* from the requirement because the term is ambiguous.

Response

No changes were made in response to this comment. While the term *avoidable* may be somewhat subjective, the commission disagrees that the suggested change would provide clarity. Removing the term might imply that even the smallest leak in the system is a violation of the rule and that all leaks are avoidable, which is not the commission's intent. Additionally, the preamble to the 1994 adopted rule (19 TexReg 3073) describes unavoidable leaks as those that would occur during an upset condition.

Comment

TTOG suggested revising §115.541(d) to state that a transport vessel must remain vapor-tight until VOC vapors are routed to a control device except when opening the vessel to inspect for, and remove as necessary, any residual liquid heel prior to beginning the degassing or cleaning process; any residual pressure contained in the vessel must be routed to a control device that meets the requirements in §115.542(a) until the transport vessel reaches ambient pressure. TTOG commented the change is necessary because §115.546(a)(1)(B) requires records of the quantity of liquid in the vessel prior to degassing, which cannot be obtained without opening and inspecting the vessel. TTOG commented that the common practice of opening transport vessels to inspect for and remove residual liquid heels prior to degassing and cleaning is beneficial because it reduces overall VOC emissions and reduces residual VOC liquid mixing in with the wash water stream. TTOG added that the practice is currently required as best available control technology in agency NSR permits.

Response

No changes were made in response to this comment. The commission respectfully disagrees that the suggested changes are necessary to comply with the requirements in §115.546(a)(1)(B) to estimate the quantity of liquid in the vessel prior to degassing. The suggested change also does not appear to be necessary to comply with best available control technology in agency NSR permits because this requirement applies to removing the liquid heel prior to cleaning and still requires the vessel to first be degassed to a control device. In addition, the suggested change would be a relaxation of the existing requirements.

Comment

TCC suggested that for clarity §115.542(f) should be revised to state that in addition to the requirements in subsections (a) - (c) of this section, all VOC vapors from a floating roof storage tank

subject to §115.140(a) concerning preparation of a storage tank, transport vessel, or marine vessel for cleaning, inspection, or maintenance must be routed to a control device immediately but no later than 24 hours after the tank has been emptied to the extent practical or the drain pump loses suction.

Response

No changes were made in response to this comment. As stated in §115.540(a), the commission agrees that the requirements in this division, including the requirement in §115.541(f), apply to degassing during, or in preparation of, cleaning any storage tank, transport vessel, or marine vessel containing VOC with a true vapor pressure greater than or equal to 0.5 psia under actual storage conditions. However, the commission does not agree that the suggested change is necessary to clarify the rule applicability.

Comment

TCC commented that in its broadest sense, the requirement for all floating roof storage tanks to route vapors to a control device within 24 hours after landing a floating roof might include floating roof landings not associated with degassing or cleaning events. TCC stated this rulemaking should not address scenarios that are outside the scope of the specified degassing rule applicability. TCC added that rules to address floating roof landings for tanks or events outside the applicability of the degassing rule should be addressed as proposed amendments to the storage tank rule in §115.112(d)(2).

TTOG suggested deleting §115.541(f) because it has limited benefit and in some cases conflicts with NSR permits. TTOG also raised concerns with technical infeasibility due to changes in scheduling, especially if a third party's portable control device is used. TTOG added that the provision was much more stringent than the current rule, which was contrary to the commission's stated intent at proposal. TTOG also commented that the change was not necessary for SIP approvability because the EPA has previously approved the rules. TTOG commented that §115.541(f) should be deleted or revised to limit the requirement's applicability to certain operating scenarios and its severity should be reduced. TTOG suggested alternative language that would extend the time limit to 72 hours and create exemptions from the time limit for cleaning and degassing operations authorized under Chapter 106 or 116, drain dry tanks, and for tanks where the material most recently stored has a vapor pressure not greater than 1.5 psi. TTOG also objected to the application of the same or a similar requirement to other types of storage tanks.

TxOGA strongly opposed the 24-hour limit in §115.541 because terminals cannot always comply with this new requirement. TxOGA commented that despite proper planning, it may take more time for the contractor to mobilize, and the contractor's schedule and delays are beyond the terminals' control, or there may be an unscheduled event such as a tank identified for immediate emptying and repair. TxOGA suggested controlled degassing begin no later than 72 hours after the tank drain pump losses suction or the tank has been emptied to the extent practical by other means. TxOGA commented that the technical basis for this suggestion is the use of equations from API Technical Report 2568 indicating that minimal emissions occur from the daily standing idle loss and added that the majority of emissions occur during the ventilation and sludge removal process. TxOGA also suggested an exemption for drain-dry tanks since they do not continue to generate vapors beyond the 24-hour limit.

Response

The commission agrees that in some instances the 24-hour limit may not be necessary and has revised §115.541(f) to extend the degassing start time from 24 hours to 72 hours if the most recently stored product has a true vapor pressure less than 1.5 psia. Drain-dry floating roof tanks have also been exempted from the requirement of §115.541(f); however, a drain-dry floating roof tank remains subject to the other requirements in this division. The commission does not agree that 72 hours is routinely necessary to begin degassing and maintains that the 24-hour time limit is feasible with proper planning in most circumstances. However, the commission agrees that there may be extenuating circumstances where more time may be appropriate and some flexibility in the rule is necessary. Therefore, the commission adopts §115.541(f)(3) as an alternative for the owner or operator to comply with the time limit established in a permit issued under Chapter 116 up to a maximum of 72 hours after the tank has been emptied to the extent practical or the drain pump losses suction. The permit review process required by Chapter 116 offers a better opportunity for the commission to review possible extenuating circumstances that may apply on a case-by-case basis, therefore, the requirements developed as part of the Chapter 116 permit will offer the necessary protections for air quality that are contingent on when the degassing process should start. According to the TCEQ Air Permits Division, 72 hours is the maximum amount of time allowed before degassing must start within any permits currently issued under Chapter 116. If the case-by-case review for the permit establishes that 24 hours is the appropriate time limit for degassing to start, then the 24 hours becomes the enforceable time limit for the purposes of subsection (f)(3). If the case-by-case review demonstrates that extenuating circumstances justify additional time before degassing must start, then subsection (f)(3) provides the flexibility necessary to account for these circumstances but also sets an upper limit of 72 hours. The upper limit of 72 hours is necessary to establish replicability in the rule and help ensure EPA approval but is not intended to be a constraint on the case-by-case review process for permitting. Owners or operators of sites with a permit that does not set a time limit for when degassing must start would be subject to subsection (f)(1) or (2), as applicable, and subsection (f)(3) would not apply. The commission does not agree that the owner or operator can start the degassing to comply with a permit issued under 30 TAC Chapter 106, Permits By Rule, because there is no time limit established to start the degassing under §106.263, Routine Maintenance, Start-up and Shutdown of Facilities, and Temporary Maintenance Facilities. In addition, a case-by-case review is not necessary for a site to apply for and use a Chapter 106 permit by rule, and subsection (f)(3) would not apply.

With regard to the comment that the provision is unnecessary for SIP approvability, the commission did not propose the provision to obtain SIP approvability. The time limit is intended to minimize standing idle emissions from floating roof storage tanks by ensuring that the tanks are degassed to a control device as expeditiously as practicable. Furthermore, §115.541(f) was not proposed solely as a clarification as suggested by TTOG. While the provision does provide clarity as to when degassing to a control device was required to begin, the stated intent of the provision in the preamble of the proposed rules (35 TexReg 6980) was also to minimize standing idle emissions from floating roof storage tanks.

Finally, the commission is not expanding this requirement to apply to other types of storage. The primary purpose of the provision was to help address standing idle emissions from floating

roof storage tanks, and the commission has determined that it is not necessary to expand the time limit to other tanks at this time.

Comment

EPA suggested that the word *immediately* be replaced with the phrase *as soon as possible* in §115.541(f).

Response

The commission agrees with the commentor and has made the suggested change.

Section 115.542, Control Requirements

Comment

TxOGA suggested revising §115.542 to state that the control device must maintain a control efficiency of at least 90% and must be operated within the parameters used during the source test.

Response

No changes were made in response to this comment. Section 115.542(a)(1) states that the control device must maintain a control efficiency of at least 90% and must be operated in a manner consistent with how the device was operated during the control efficiency demonstration required in §115.544(c). This requirement does not mean that the control device must be operated exactly the same as the control device operated during the control efficiency demonstration. The commission understands that the flow rate will change according to the heat loading to the control device. However, the flow rate should not exceed the maximum design flow rate of the control device during the degassing operation. The commentor's suggested wording has the same meaning as the proposed rule language.

Comment

TCC suggested that §115.542(a)(2) concerning the use of a flare as a control device should be revised to eliminate the proposed additional requirement to ensure the flare is lit at all times. TCC commented that this language is ambiguous and inconsistent with federal regulatory language requiring monitoring of the pilot flame, gives the appearance of requiring additional flare monitoring, and is redundant to the requirement in §101.221(a) that all pollution emission capture equipment and abatement equipment is to be maintained in good working order and operated properly during facility operations. TCC commented that new or additional flare requirements are outside the scope of this rulemaking and should be reserved until such time as additional scientific evidence mandates change. TCC suggested §115.542(a)(2) be revised to require the control device to be a flare that is designed and operated in accordance with 40 CFR §60.18(b) - (f) and 30 TAC §101.221(a).

TTOG supported the principle behind the structure of §115.542(a) that the standards applicable to control devices used in degassing should be relevant to the types of control devices used and should offer reasonable flexibility. However, TTOG objected to language in §115.542(a)(2) that would regulate the ignition of VOC vapors and supplemental fuel, not merely the pilot flame, because this parameter is not easy to verify. TTOG commented that flares typically are not equipped or required to be equipped with instrumentation to monitor actual ignition of the flared materials, and the flame itself is often invisible. TTOG commented that the reference to federal requirements for flares in 40 CFR §60.18(b) - (f) is the appropriate way to regulate flares at this time. TTOG commented that although current research may suggest that flares may not always successfully ignite VOC vapors that pass through them, such an indication would not foreclose the more general conclusion that a flare operated consistently in accordance with 40 CFR §60.18(b) - (f) can provide emissions control performance that matches or exceeds the proposal's more general 90% control efficiency requirement. TTOG did not believe that the appropriate response to doubts about the overall control efficiency of flares is to make tank operators accountable for non-combustion. TTOG added that a requirement for the flare itself to be continuously lit in addition to the requirements in 40 CFR §60.18(b) - (f) represents a significant departure from the commission's historical regulation of flares and does considerably more than clarify how flares are treated under the current tank degassing rules. TTOG commented that such a requirement would warrant an extended compliance period to develop and install appropriate instrumentation on flares used in degassing. TTOG suggested §115.542(a)(2) be revised to require the control device to be a flare that is designed and operated in accordance with 40 CFR §60.18(b) - (f).

Response

No changes were made in response to these comments. In addition to complying with the operating parameters in 40 CFR §60.18, the commission is requiring that flares used during degassing operations must be lit at all times when VOC vapors are routed to the device. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the rules is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device. The commission respectfully disagrees with TTOG's suggestion that the change is a significant departure from the commission's historical regulation of flares. It has always been the commission's expectation that the actual flare flame be lit as part of the proper operation of a flare. The language in §115.542(a)(2) makes this expectation clear in the rule. Furthermore, the §115.542(a)(2) does not require additional monitoring to verify the flare flame presence. Affected regulated entities may install additional monitoring to perform this verification if they choose to, but the rule does not require monitoring. Owners or operators have the flexibility to select the means that compliance with §115.542(a)(2) is demonstrated.

The commission respectfully disagrees with TCC's comment that the provision is ambiguous and redundant with §101.221(a). The provisions in §101.221(a) are more general while the language in §115.542(a)(2) makes the commission's intent clear that the flare shall be lit at all times when VOC vapors are routed to the flare.

Comment

ProAct requested the commission confirm the interpretation that no initial or follow-up control efficiency demonstration is required if the control options in §115.542(a)(2) - (4) are used.

Response

The commission confirms the interpretation.

Comment

NanoVapor suggested including specific rules allowing the use of suppression technologies. Specifically, NanoVapor suggested the commission define a vapor suppression system as a control device that uses low vapor pressure chemistry inserted above the stored liquid level, without displacement of VOC from the vessel, which reduces and maintains the vapor

pressure of the contained VOC to partial pressure of 0.5 psia or less; these systems generally consist of a delivery system, piping, ductwork, and pressure or concentration monitoring equipment. NanoVapor added that as this technology eliminates vapor creation rather than destroying vapors after creation, current regulations may not apply. NanoVapor also suggested including a new §115.542(a)(5) to allow the use of a vapor suppression system that does not cause the pressure inside the tank or vessel to increase by more than one inch water pressure above atmospheric pressure at any time during the degassing or cleaning operation. NanoVapor suggested the commission provide an alternative in §115.542(b) to allow a tank or vessel to be vented to the atmosphere without control once a control device using vapor suppression technology has reduced the true vapor pressure within the tank or vessel below 0.5 psia.

Response

No changes were made in response to this comment. The vapor suppression system technology is currently still under development. Additional technical information is necessary to demonstrate that this technology works when the liquid heel surface is disturbed. The commission may consider the application of a vapor suppression system as an alternative in a future rulemaking if more technical data becomes available.

Comment

EPA recommended deleting the requirement in §115.542(b) that the percent LEL measurements be expressed as methane. EPA commented that since LEL is expressed as a percentage, a comparison to methane is not necessary and may be confusing.

Response

The commission agrees with the comment and has deleted the requirement that the percent LEL measurements be expressed as methane in this section and in all other sections in this division.

Comment

Green Environmental requested the commission further explain the allowable concentration limit in proposed §115.542(b). Green Environmental commented that it does not appear that the 34,000 ppmv limit has any specific relationship with methane, since it is based on molar volumes at 0.5 psia of VOC partial pressure and requested the commission remove the requirement for this measurement to be expressed as methane. Green Environmental commented that if the molecular weights of methane and air were included in the 34,000 ppmv limit calculation, then it may be more appropriate to show this criterion as 34,000 ppmv VOC or 19,000 parts per million by weight as methane. Additionally, Green Environmental questioned how 50% of the methane LEL, or 25,000 ppmv, compares to 34,000 ppmv and asked the commission to clarify if the intention is to require a more stringent limit when measured by an LEL meter, or if this should instead be 50% of the LEL for the individual VOC being tested with a methane-calibrated meter.

Response

No changes were made in response to this comment. The 2007 preamble to the degassing rule revisions (32 TexReg 3178) stated that the VOC concentration equivalent to 50% of the LEL is less than 34,000 ppmv; therefore, 50% of the LEL is an acceptable criterion to determine when degassing vapors can stop being routed to a control device. An LEL meter is commonly used for confined space entry and provides a more stringent limit than 34,000 ppmv. As discussed elsewhere in this RESPONSE TO COMMENTS section, all references to requiring the LEL to be expressed as methane have been removed from the adopted rule. With regard to expressing the 34,000 ppmv, expressed as methane, this requirement is consistent with the current rule and expressing the VOC concentration as a surrogate is necessary given the methods used to determine the concentration level for the purposes of the rule. Portable analyzers that may be used with Method 21 must be calibrated with a reference compound, and methane is the typical calibration reference for analyzers equipped with flame ionization detectors. The commentor is correct that 34,000 ppmv, expressed as methane may not directly correlate to 34,000 ppmv as a different compound. However, determining the true VOC concentration as the exact species of VOC would require more advanced and costly test procedures than currently prescribed by the rule for monitoring the VOC concentration in the degassed vapors. The 34,000 ppmv concentration threshold reported as methane establishes a consistent methodology for performing the monitoring.

Comment

TTOG commented that the location of the VOC monitoring equipment in §§115.542(b), 115.544(b)(3), and 115.544(b)(4)(C)(ii) should be revised to accommodate degassing units that cannot measure vapor space VOC concentrations immediately before the inlet to the control device. TTOG suggested revising the rules to allow the VOC concentration to be measured before the inlet to the control device or inside the vapor space.

Response

As proposed, §§115.542(b), 115.544(b)(3), and 115.544(b)(4) require the VOC concentration to be measured before the inlet to the control device but do not require the VOC samples to be taken immediately before the inlet to the control device. While as proposed, the language could still be interpreted to allow VOC concentration measurements taken inside the tank or vessel vapor space, the commission agrees that the rules should clearly indicate that this is allowed. Therefore, the commission has included §115.544(b)(6) in the adopted rule that clarifies that the sampling location for performing the monitoring required by §115.544(b)(3) may be immediately before the control device, in the transfer line from the tank or vessel to the control device, or in the vapor space of the tank or vessel provided it is representative of the concentration of VOC entering the control device. In addition, the commission has removed the references to before the inlet to the control device from adopted §§115.542(b), 115.544(b)(3), and 115.544(b)(4).

Comment

TTOG suggesting revising §115.542(d) to delete the requirement that all lines are closed when disconnected or equipped to discharge residual VOC in the line into a closed recovery or disposal system after degassing or cleaning is complete. TTOG commented that the proposed rule language would require containment of air in hoses and lines that meets degassing specifications.

Response

The commission has revised the rule as suggested. The VOC concentration in the transfer lines will already be less than the VOC concentration that is required to be routed to a control device and therefore will not need to be controlled to demonstrate compliance with the requirements in this division.

Section 115.544, Inspection, Monitoring, and Testing Requirements

Comment

TxOGA agreed that monitoring once every 15 minutes is sufficient to demonstrate compliance with the continuous monitoring requirements in §115.544.

Response

The commission appreciates the support.

Comment

Section 115.544(a)(2) requires degassing or cleaning through the affected transfer lines to be discontinued when a leak is observed and the leak cannot be repaired within a reasonable length of time. EPA suggested removing the phrase *and the leak cannot be repaired within a reasonable length of time* from §115.544(a)(2) because it is ambiguous.

Response

No changes were made in response to this comment. The commission respectfully disagrees with the suggested change. Similar to the commentor's suggested change to §115.541(c), removing the provision could require owner or operators to stop and restart degassing operations numerous times while degassing a tank or vessel to repair minor leaks, which could cause greater emissions that the repairs would prevent. The commission expects that degassing operations would be discontinued if the emissions resulting from continued operation of the leaking control device would be greater than the emissions generated by a shutdown of the control device to repair the leak.

Comment

Green Environmental commented that many of the repeated measurements are aimed at determining continued evolution of VOC from sludge in stationary storage tanks. Green Environmental suggested that if this is the case, marine and transport vessels should be exempt from these repeated measurements, as should tanks that are cleaned frequently, especially drain-dry tanks, since this minimizes the possibility for sludge accumulations. Green Environmental added that once personnel are entering the vessel to complete the cleaning, drying, or inspection, United States Occupational Safety and Health Administration (OSHA) regulations should take precedence, and the personnel should be allowed to concentrate strictly on their own safety while in a confined space.

Response

No changes were made in response to this comment. The commentor has not provided sufficient basis for why marine vessels, transport vessels, and frequently cleaned tanks should be exempt from the monitoring requirements of the rule. While the commission strives to ensure its rules do not interfere with safe facility operation, it is not the purpose of these rules to ensure the tank is safe for personnel to enter. The purpose of the rules in Subchapter F, Division 3 is to minimize VOC emissions from the degassing of tanks and vessels and the commission maintains that the monitoring requirements do not cause an unsafe condition. The measurements required by §115.544(b)(4) are necessary to ensure that degassing to a control device was not discontinued prematurely. Additionally, as discussed elsewhere in this RESPONSE TO COMMENTS section, the adopted rule establishes provisions that allow for ceasing the measurements required by §115.544(b)(4) if the tank or vessel has been degassed to a VOC concentration level sufficiently low to ensure the concentration will not likely rise back above the control level required for the rule. The commission has determined that if the threshold is set at 6,800 ppmv, expressed as methane 10% LEL, it is unlikely that the VOC concentration will increase above 34,000 ppmv or 50% of the LEL. In addition, to comply with the OSHA confined space entry standard, the tank or vessel must be degassed to 10% of the LEL in order to send people into the tank for cleaning.

Comment

TCC requested clarification that for control devices not specifically listed in §115.544(b)(2)(A) - (H), the owner or operator may select any operational parameters necessary to demonstrate proper functioning of a control device in accordance with §115.544(b)(2). TCC commented that some control devices, such as absorbers, that may meet the control requirements in §115.542(a)(1) or (4) are not specifically listed in the monitoring section.

Response

The commission agrees with the commentor and is adopting §115.544(b)(2)(J) to specify that for a control device not listed in §115.544(b)(2), the owner or operator shall continuously monitor one or more operational parameters sufficient to demonstrate proper functioning of the control device to design specifications. In addition, the commission is adopting §115.546(a)(2)(J) requiring the owner or operator to maintain records of the continuous operational parameter monitoring required in §115.544(b)(2)(J) sufficient to demonstrate proper functioning of the control device not listed in this paragraph.

Comment

TTOG suggested adding a new option to §115.544(b)(2) to allow an owner or operator to comply with control device monitoring requirements based on corresponding monitoring requirements in an applicable permit.

Green Environmental suggested revising §115.544(b)(2)(E) to allow facilities with hydrogen or supplemental fuel monitoring conditions in their NSR permits to fall back on the specific requirements in their permits in lieu of these requirements. Green Environmental commented that the commission has been inserting flare monitoring requirements into NSR permits for the past few years and often requires site-specific negotiations in order to make arrangements that will demonstrate compliance with 40 CFR §60.18 using as much of the facility's existing instrumentation as possible. Green Environmental commented that the NSR requirements are specifically negotiated in a way that uses the instrumentation available at a particular facility; for example, there may not be a continuous calorimeter or a monitor of the supplement fuel itself, but a monitor of another parameter that the facility has shown through NSR permit negotiations will demonstrate continuous compliance with 40 CFR §60.18. Green Environmental added that the NSR permits typically require that the monitors be operational 95% of the time, whereas this proposed regulation does not make such an allowance.

Response

No changes were made in response to these comments. The commission does not agree with the commentors' suggestion to allow an owner or operator to comply with control device monitoring requirements based on corresponding monitoring requirements in an applicable permit. Subchapter F, Division 3 is included in the SIP and establishing consistency in the monitoring and testing methods is necessary for EPA approval of the revised rule. However, the commission does agree that additional flexibility is needed in the monitoring provisions of the rule to allow

the executive director to approve minor modifications or alternatives to the monitoring. Therefore, §115.544(b)(5) is included in the adopted rule to allow the executive director to review and approve modifications and alternatives, if determined to be appropriate. Adopted subsection (b)(5) allows the executive director to approve minor modifications as well as alternative monitoring. Similar to the alternative test method provisions in §115.545(15), alternative monitoring methods must be validated using the comparison procedures in EPA Method 301. These provisions for modifications and alternatives to monitoring requirements have been approved by the EPA in prior rulemaking.

Comment

TxOGA suggested requiring the owner or operator to monitor any operational parameters defined in the source test necessary to demonstrate proper functioning of a control device used to comply with this division at all times when VOC vapors are routed to the device.

Response

No changes were made in response to this comment. However, as discussed in the RESPONSE TO COMMENTS section of this preamble, the commission is adopting §115.544(b)(2)(J) to specify that for a control device not listed in §115.544(b)(2), the owner or operator shall continuously monitor one or more operational parameters sufficient to demonstrate proper functioning of the control device to design specifications.

Comment

Green Environmental commented that the inspection, monitoring, and testing requirements in §115.544 is the first time it has seen an attempt in a general VOC rule to codify methods to demonstrate compliance with 40 CFR §60.18 for flares. Green Environmental suggested that such an endeavor might best be handled in a separate rule review, since the incorporation of this verbiage will be setting a significant regulatory precedent that should be called to the attention of the regulatory community as a whole, as opposed to those specifically following the tank degassing rule.

Response

No changes were made in response to this comment. The existing rules require VOC vapors from affected tanks or vessels to be routed to a control device until the concentration is less than 34,000 ppmv, expressed as methane. However, as the VOC vapor concentration approaches 34,000 ppmv, there may not be sufficient heat content to meet the minimum net heating value requirements in 40 CFR §60.18. Therefore, it may be necessary to monitor the net heating value of the VOC vapors routed to the flare to ensure there is sufficient energy available to support combustion.

Comment

TTOG commented that the extraordinary requirements in §115.542(a)(2) and §115.544(b)(2)(E) should be evaluated evenly across different constituencies that use flares for emissions control in various operating scenarios. TTOG commented that the commission currently has a Flare Task Force Stakeholder Group, the purpose of which is to help keep stakeholders informed and solicit comments on potential future agency actions related to flares. TTOG suggested the commission's deliberations on whether to require that a flare be continuously lit would be better informed in the context of a rulemaking in which flare operation generally is the focus and in which a larger constituency is invited to comment.

Response

No changes were made in response to this comment. As discussed elsewhere in this RESPONSE TO COMMENTS section, the commission is specifically requiring the flare flame to be lit to clarify that the intent of the rules and the commission's expectation is that both the flare flame and the pilot are lit at all times when VOC vapors are routed to the device. The commission also respectfully disagrees that the monitoring requirements specified for flares in this rulemaking would be best considered in the context of other operations. The emissions from the degassing of tanks and vessels are somewhat unique in that it is an event-driven operation that results in the degassing stream being sent to the flare likely approaching a point that the flare will not operate properly without supplemental fuel, i.e., below the minimum net heating value requirements in 40 CFR §60.18. Applying appropriate monitoring for flares used for the purposes of this rule is best considered in the context of this rulemaking and not in a more general context.

Comment

Green Environmental commented that §115.544(b)(2)(E) should allow facilities the option to monitor hydrogen content instead of heating value for flares complying with 40 CFR §60.18(c)(3)(i). Johann Haltermann commented that §115.544(b)(2)(E) makes no allowances for operating a flare using hydrogen as a supplement per 40 CFR §60.18(c)(3)(1)(i). Johann Haltermann commented that there are no British thermal units (Btu) requirements when using hydrogen as a supplement, only a percent hydrogen requirement before burning. Johann Haltermann suggested revising §115.544(b)(2)(E) to limit compliance to only those sources using natural gas as a supplemental fuel so that companies that currently do not have a calorimeter on their flare would not need to install one. Johann Haltermann added that installation of a calorimeter is an unnecessary burden when a company can prove that the net heating value at the flare meets the requirements of 40 CFR §60.18.

Response

The commission agrees with the comments concerning hydrogen and is adopting clause (iv) specifying that for a non-assisted flare that qualifies for the provisions in 40 CFR §60.18(c)(3)(i), the owner or operator may elect to continuously monitor the hydrogen content of the gas stream routed to the flare and continuously meet the minimum 8.0% by volume hydrogen content requirement in lieu of the requirements in clauses (i) - (iii). The commission respectfully does not agree that it is appropriate to limit compliance to only those sources using natural gas as a supplemental fuel so that companies could avoid installing a calorimeter. The installation of a calorimeter is one of the compliance options provided in the rule but the rule does not require the use of this technology. Therefore no changes were made in response to this comment.

Comment

TTOG requested that §115.544(b)(2)(E)(i) be revised to replace the term *VOC vapors* with the term *gas stream.* Section 115.544(b)(2)(E)(i) requires continuous monitoring of the net heating value of the VOC vapors routed to the flare.

Response

The commission agrees with the commentor and has replaced the term *VOC vapors* with the term *gas stream* since it more appropriately represents the total net heating value routed to the flare.

Comment

Green Environmental suggested revising §115.544(b)(2)(E)(i) and (ii) to add an introductory sentence to indicate that the purpose of this monitoring is to demonstrate compliance with the requirements in 40 CFR §60.18.

Response

The commission agrees with the commentor and has revised §115.544(b)(2)(E) to clarify that the monitoring requirements listed in this subparagraph are necessary to demonstrate compliance with the requirements in 40 CFR §60.18.

Comment

Green Environmental commented that §115.544(b)(2)(E)(ii) does not specify that the volume of supplemental fuel added must be considered with the total waste gas flow (with assumed zero Btu value) in order to demonstrate an overall heating value per standard cubic foot of the flared gas. Green Environmental stated that since the control requirement no longer applies once the VOC concentration is below 34,000 ppmv, the owner or operator should be allowed to assume that 3.4% of the gas stream to the flare, prior to natural gas or hydrogen supplementation, contributes Btu value from the specific VOC being degassed rather than assuming zero heating value from the VOC vapors routed to the flare.

TTOG stated that proposed §115.544(b)(2)(E)(ii) would call for monitoring of flare parameters that are not relevant to flare performance to the extent that it addresses the volume of supplemental fuel or monitoring or calculations solely addressed to the non-fuel component of the gas stream.

Response

The commission agrees with the commentors and has revised §115.544(b)(2)(E)(ii) to allow the owner or operator to continuously monitor the total volume of supplemental fuel added to the gas stream routed to the flare and continuously maintain sufficient supplemental fuel to meet the minimum net heating value requirements in 40 CFR §60.18 assuming that the net heating value contribution from the degassed VOC vapor is equivalent to a level corresponding to 50% of the LEL. The owner or operator may estimate the volumetric flow rate from the tank or vessel for the purpose of this calculation if the flow rate of the degassed VOC vapor is not directly monitored. Assuming a VOC concentration corresponding to 50% of the LEL will reduce the amount of supplemental fuel required while conservatively assuring that the net heating value of the fuel and degassed VOC vapor combination is over the value specified in 40 CFR §60.18.

Comment

TCC requested §115.544(b)(2)(E)(ii) be revised to clarify that in addition to the continuous monitoring options provided for a flare, the owner or operator is alternatively allowed to comply with the monitoring requirements of 40 CFR §60.18(f)(2) including detection of a pilot flame.

Response

No changes were made in response to this comment. The monitoring requirements in 40 CFR §60.18(f)(2) are intended to demonstrate presence of the flare pilot flame and are already incorporated by reference in §115.542(a)(2). The monitoring requirements in §115.544(b)(2)(E) are intended to demonstrate compliance with the minimum net heating value requirements in 40 CFR §60.18(c)(3)(ii). The commission does not agree that monitoring the flare pilot flame is an appropriate demonstration of compliance with the minimum net heating requirements.

Comment

Green Environmental suggested that an option be added to §115.544(b)(2)(E) to allow a discrete flare performance test during a period of cleaning or degassing as a means of demonstrating compliance with 40 CFR §60.18, since this means of demonstration is routinely allowed under EPA rules. Green Environmental suggested that such a test could be required to be repeated periodically, perhaps every five years.

Response

No changes were made in response to this comment. The requirements in Chapter 115, Subchapter F, Division 3 do not require a discrete flare performance test to demonstrate compliance with the requirements in 40 CFR §60.18. The monitoring requirements in §115.544(b)(2)(E) are intended to demonstrate compliance with the minimum net heating value requirements in 40 CFR §60.18(c)(3)(ii). The commission does not agree that a one-time or periodic discrete flare performance test is appropriate to satisfy the intended purpose of the monitoring requirements in §115.544(b), which is to serve as an ongoing demonstration of compliance with the minimum net heating requirements of 40 CFR §60.18. While the commentor is correct that the EPA has routinely allowed discrete flare tests under 40 CFR §60.18 as a demonstration of compliance under various regulations, that does not automatically make it appropriate for the purposes of this rulemaking. The nature of degassing tanks and vessels makes the streams sent to a flare being used as a control device highly variable from situation to situation. A discrete flare test is not sufficient to ensure that the flare will perform adequately at subsequent degassing events because the flare test is predominately an evaluation of the stream sent to the flare that changes with each degassing event.

Comment

ProAct requested confirmation that §115.544(b)(2)(F) would also include thermal oxidizers if a control efficiency test is not performed according to §115.542(a)(1).

Response

The commission agrees that if a thermal oxidizer is not operated in compliance with the requirement in §115.542(a)(1) then the thermal oxidizer must be operated in compliance with the requirement in §115.542(a)(4) and must comply with the monitoring requirement in §115.544(b)(2)(F).

Comment

TCC suggested deleting the term *continuously* in §115.544(b)(2)(F)(ii) to be consistent with the requirement to monitor at least once per hour.

Response

The commission agrees with the comment and the word *continuously* has been deleted from §115.544(b)(2)(F)(ii). Additionally, in response to comments, adopted §115.544(b)(2)(F) requires the owner or operator to monitor the exhaust gas VOC concentration within one hour after beginning the degassing operation. Adopted subparagraph (F) also requires the VOC concentration

measurement to be one-hour test runs using one of the methods listed in clauses (i) or (ii).

Comment

Green Environmental requested the commission clarify if the term *thermal oxidizer* includes enclosed flares in which the firebox temperature is monitored continuously, and for which the manufacturer guarantees 99% VOC destruction if that temperature is maintained above a required set point. Specifically, Green Environmental questioned if the commission uses the definition in 40 CFR §60.501 that defines a flare as a thermal oxidation system using an open (without enclosure) flare.

Response

No changes were made in response to this comment. A flare is defined in §101.1(37) as an open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame and that is used as a control device; a flare may be equipped with a radiant heat shield (with or without a refractory lining) but not equipped with a combustion air control system. If the enclosed flare referenced by the commentor is equipped with a combustion air control systems then it would not be considered a flare under §101.1(37).

Comment

Green Environmental commented that the requirement in §115.544(b)(3) to measure VOC concentration once per minute for five minutes will be very difficult for a facility that is steam-cleaning tanks and is collecting bag samples in order to take LEL or TOC measurements. Green Environmental commented that it would be helpful if a statement similar to that in §115.545(3)(A) were included in §115.544(b)(3) to allow those collecting bag samples (regardless of whether Method 18 or an LEL meter is used) to only collect one sample. Alternatively, Green Environmental requested the current wording in §115.545(11)(C) be retained to clearly allow bag sampling. In addition, Green Environmental requested that §115.545(11)(E) be retained to clarify to clearly allow the use of portable analyzers.

Response

No changes were made in response to this comment. However, as discussed elsewhere in this preamble, in response to comments the commission has revised §115.544(b)(3) to allow one five-minute integrated bag sample to determine VOC concentration. For a steam-cleaned tank, it is more likely the VOC concentration is homogeneous inside the tank due to the steam-cleaning effect. The integrated bag sampling result is likely to be the same as five separate sampling results. In addition, integrated bag sampling is allowed under Method 18. The current requirements for bag sampling in §115.545(11)(C) and portable hydrocarbon gas analyzers in §115.545(11)(E) have been integrated into Method 18 and Method 21 in the rule.

Comment

TTOG supported the commission's proposal to provide more than one option for demonstrating compliance with applicable VOC concentration standards. TTOG commented that the option in §115.544(b)(4)(A) is substantially reproduced from current tank degassing rules in §115.542(a)(6) and (b)(5). Although this condition would be unreasonably burdensome if required after all degassing operations, TTOG believed that it should be retained as one of multiple compliance demonstration options consistent with the structure of proposed §115.544(b)(4).

Response

The commission appreciates the support and is retaining the requirements in §115.544(b)(4)(A).

Comment

EPA recommended deleting the requirements in §115.544(b)(4)(A) that the percent LEL measurements be expressed as methane. EPA commented that since LEL is expressed as a percentage, a comparison to methane is not necessary and may be confusing.

Response

The commission agrees with the EPA's comment and has deleted the requirement that the percent LEL measurements be expressed as methane in this section and in all other sections in this division.

Comment

Green Environmental commented that the requirement in §115.544(b)(4)(A) to continue measuring VOC concentration every 12 hours is unworkable for a tank that is to be cleaned and placed into another service or a barge that is to be cleaned and sent on its way. Green Environmental commented that while the rule does state that this requirement applies while venting to the atmosphere, it is not clear that these measurements are not required and will actually delay normal operations. Green Environmental suggested adding a statement that clarifies that this requirement is suspended if the tank or vessel is closed or put back into chemical service.

Response

No changes were made in response to this comment. The monitoring requirements in §115.544(b)(4)(A) apply while the tank or vessel is venting to the atmosphere without control. A tank or vessel that is closed and returned to service would not be venting to the atmosphere without control and would not be required to continue to comply with the monitoring requirements in §115.544(b)(4)(A). In addition, the commission is adopting §115.544(b)(4)(A)(iii) to allow the suspension of VOC monitoring if the VOC concentration inside the tank or vessel is less than 6,800 ppmv, expressed as methane or 10% of the LEL. The commission does not agree that the suggested change is necessary.

Comment

ProAct suggested the commission clarify that the concentration measurements required in §115.544(b)(4)(A) are required to be done using the methodology described in §115.544(b)(3).

Response

No changes were made in response to this comment. The commission does not agree that the VOC concentration or percent LEL measurements required in §115.544(b)(4) need to be taken using the procedure described in §115.544(b)(3). Once the tank or vessel has been vented to the atmosphere without control for 12 hours there is no reason to anticipate that there will be enough residual liquid remaining in the tank or vessel to cause the VOC concentration to change substantially within five minutes.

Comment

TTOG commented that various provisions of the proposal (including compliance demonstration options in §115.544(b)(4)(A)

and (C)) use the phrase *vent to the atmosphere,* or a derivation, in a way that is ambiguous and could create unintended compliance difficulty for floating roof tanks. TTOG urged the commission to provide an appropriate clarification.

Response

No changes were made in response to this comment. For the purpose of this rule, the commission uses the phrase *vented to the atmosphere without control* to describe a tank or vessel that is either mechanically vented to the atmosphere using an air-moving device or passively vented to the atmosphere without an air-moving device through vacuum breaker vents or open manways without sending VOC vapors to a control device during the degassing operation.

Comment

TxOGA commented that §115.544(b)(4)(A) requires monitoring every 12 hours while venting to the atmosphere. TxOGA stated that the mechanical ventilation of a degassed tank may be discontinued overnight when a work crew leaves, and monitoring will not occur during that time, which could exceed 12 hours. TxOGA requested the rule specify that the 12-hour measurements are only required while mechanically venting to the atmosphere. TxOGA added that based on API Technical Report 2568 no emissions will occur from sundown to sunrise due to cooling effects on the vapor space air would flow into the tank as the vapor space contracts.

Response

No changes were made in response to this comment. The monitoring requirements in §115.544(b)(4)(A) apply while the tank or vessel is venting to the atmosphere without control. For the purpose of this rule, the commission uses the phrase *vented to the atmosphere without control* to describe a tank or vessel that is either mechanically vented to the atmosphere using an air-moving device or passively vented to the atmosphere without air-moving device through vacuum breaker vents or open manways without sending VOC vapors to a control device during the degassing operation. A tank or vessel that is closed would not be venting to the atmosphere without control and would therefore not be required to continue to comply with the monitoring requirements in §115.544(b)(4)(A). In addition, the commission is adopting §115.544(b)(4)(A)(iii) to allow the suspension of VOC monitoring if the VOC concentration inside the tank or vessel is less than 6,800 ppmv, expressed as methane or 10% of the LEL. The commission does not agree that the suggested change is necessary.

Comment

ProAct commented that once the VOC concentration inside the tank or vessel is less than 1% of the LEL there should be no concern about the vapor concentration increasing again. ProAct suggested the commission revise the requirement in §115.544(b)(4)(B) to state that the storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control for the remainder of the degassing or cleaning operation and no further VOC measurements are required if the VOC concentration inside the tank or vessel is less than 1% of the LEL or less than 500 ppmv, expressed as methane in accordance with §115.541 and §115.542.

TTOG supported what it perceives as the principle behind the proposed option in §115.544(b)(4)(B), that a single VOC concentration measurement at a level significantly lower than the required standard provides the same verification that the standard will continue to be met as would five consecutive measurements at the level of the standard. TTOG suggested expanding §115.544(b)(4)(B) so that it can be invoked if any measurement, not necessarily one taken while the vapors are routed to a control device, meets the requisite threshold and to specify a threshold expressed in parts per million. TTOG commented that data collected in complying with current degassing rules demonstrate that any single VOC concentration measurement below 17,000 ppmv, expressed as methane provides the same verification as five consecutive measurements below 34,000 ppmv.

TxOGA commented that §115.544(b)(4)(B) allows for VOC measurements to be discontinued if the VOC concentration inside the tank or vessel is less than 1% of the LEL. TxOGA commented that after controlled degassing it should only be necessary to take VOC measurements until the tank is cleaned to safe entry levels. TxOGA requested that the 1% LEL threshold be revised to 10% LEL.

Response

In response to comments, the commission has revised §115.544(b)(4)(B) to specify that the tank or vessel can be vented to the atmosphere without control for the remainder of the degassing operation, and no further VOC measurements are required if the VOC concentration is less than 6,800 ppmv, expressed as methane or 10% of the LEL. The 12-hour monitoring data provided in public comments did not show VOC concentrations increasing above 34,000 ppmv after the tank or vessel was vented to the atmosphere without control. The commission has determined that if the threshold is set at 6,800 ppmv, expressed as methane or 10% of the LEL, it is unlikely that the VOC concentration will increase above 34,000 ppmv, expressed as methane or 50% of the LEL. In addition, to comply with the OSHA confined space entry standard, the tank or vessel must be degassed to 10% of the LEL in order to send people into the tank for cleaning.

Comment

ProAct commented that it understands §115.544(b)(4)(C) to mean that if the tank or vessel is measured at least one hour but no more than two hours after the owner or operator stops routing VOC vapors to the control device and is less than 34,000 ppmv or 50% of LEL expressed as methane, then no further VOC measurements will be required because it has been proven that the VOC will not increase again. ProAct commented that it does not believe this to be true. ProAct commented that if product, sludge, or rust scale is still in the tank and tank cleaning begins or continues after this point then it is believed that the VOC levels will likely increase again until the product, sludge, or rust scale has been adequately removed. ProAct commented that this would be similar to the previous option of using four vapor volumes to determine compliance when residual product, sludge, or rust scale still remains in the tank.

Response

The commission agrees that the VOC concentration inside the tank or vessel could increase above 34,000 ppmv or 50% of the LEL until the remaining product, sludge, or rust scale has been adequately removed. The proposed option may not provide adequate assurance the VOC concentration inside the tank or vessel will not continue to rise after the time period specified in §115.544(b)(4)(C). Therefore, in response to this comment, the commission is not adopting the alternative monitoring option proposed in §115.544(b)(4)(C).

Comment

TTOG supported the compliance demonstration option in §115.544(b)(4)(C) that allows for a single VOC concentration measurement to be taken one to two hours after degassing is concluded. TTOG commented that §115.544(b)(4)(C)(iii) should be revised to state that if the VOC concentration measured inside the tank or vessel exceeds the applicable concentration limit in §115.542(b), the VOC vapors from the tank or vessel must be routed to the control device until the VOC concentration (as measured either before the inlet to the control device or inside the vapor space) meets the applicable concentration limit in §115.542(b) and the owner or operator demonstrates compliance with the conditions of subparagraph (C).

Response

No changes were made in response to this comment. The commission appreciates the support and commentor's suggested revisions. However, in response to concerns that the VOC concentration inside the tank or vessel could increase above 34,000 ppmv or 50% of the LEL until the remaining product, sludge, or rust scale has been adequately removed, the commission is not adopting the alternative monitoring option proposed in §115.544(b)(4)(C).

Comment

TxOGA commented that the one to two-hour window on the measurements required in §115.544(b)(4)(C)(ii) is very narrow for a variable field activity like degassing, and if the tank is not venting then there seems to be no purpose for the two-hour limit. TxOGA requested the two-hour limit be removed from the rule. TxOGA also stated for many tanks and degassing controls design, it is not feasible to sample inside the tank without it being opened (vented), and if the commission is referring to mechanical ventilation in this case then the rule should be clarified.

Response

No changes were made in response to this comment. The commission appreciates the comment. However, in response to concerns that the VOC concentration inside the tank or vessel could increase above 34,000 ppmv or 50% of the LEL until the remaining product, sludge, or rust scale has been adequately removed, the commission is not adopting the alternative monitoring option proposed in §115.544(b)(4)(C).

Comment

TCC suggested revising §115.544(c) to add language to clarify that a previous performance test conducted in compliance with this section may be used to satisfy the testing requirements of this provision. TCC also requested the commission add language in §115.545 specifying that a previous test conducted in compliance with this section may be used to satisfy the testing requirements of this provision.

Response

No changes were made in response to this comment. The commission agrees that a previous performance test conducted in compliance with §115.545 is valid to satisfy the testing requirement of this division. The requirements in §115.544(c) do not require a new performance test to be conducted unless the control device is modified in a way that could reasonably be expected to decrease the control efficiency of the device.

Comment

ProAct commented that it understands §115.544(c)(1) to mean that if §115.542(a)(2) - (4) is being used to comply then this does not apply. Additionally, ProAct commented that as written this requirement is interpreted to mean that a complete new, and costly, control efficiency test would be required. ProAct commented that confirmation of control efficiency could be accurately confirmed by the same methods described in the MSS Permits. ProAct requested §115.544(c)(1) be modified to allow the use of stain tube indicators specifically designed to measure VOC concentration, provided a hot air probe or equivalent device is used to prevent error, and three sets of concentration measurements are made and averaged; portable VOC analyzers meeting the requirements of Method 21 are also acceptable for this documentation.

Response

No changes were made in response to this comment. The commission agrees that §115.544(c)(1) only applies to sources electing to use the compliance option in §115.542(a)(1). The commission does not agree that stain tube indicators are an appropriate monitoring method for this rule. Stain tubes are not an approved EPA stack test methodology and not accurate enough to be a substitute for an initial control efficiency demonstration.

Comment

TCC commented §115.544(c)(1) specifies that a control device must be retested within 60 days after any major modification when the real intent would seem to be that this is a deadline after which the control device should not be used for purposes of complying with this rule until it has been retested. TCC suggested revising §115.544(c) to state that for a control device used to comply with the requirements in §115.542(a)(1), an initial control efficiency demonstration must be conducted in accordance with the approved test methods in §115.545, and the device must be retested following any modification that could reasonably be expected to negatively affect the efficiency of a control device. TCC suggested the retest should be completed within 60 days following a modification or any time prior to reuse of the control device if retesting is not accomplished within the 60-day retest time period.

Response

The commission agrees with the commentor. In response to this comment, the commission has revised §115.544(c)(1) to require an initial control efficiency demonstration to be conducted in accordance with the approved test methods in §115.545 and require the device to be retested after any modification that could reasonably be expected to decrease the efficiency of a control device within 60 days after the modification or before being used to comply with the requirements in §115.542(a)(1), whichever is longer.

Comment

TxOGA suggested that the testing requirements in §115.544(c)(1) should be an initial compliance demonstration by the owner of the equipment, plus another demonstration within 60 days after any modification that could reasonably be expected to affect the efficiency of a control device.

TTOG suggested revising §115.544(c)(1) so that the requirement to retest 60 days after any modification only apply to a stationary control device. TTOG also stated that the tank operator cannot know whether a third party's portable control device has been modified since its last test and thus cannot reasonably assure compliance.

Response

No changes were made in response to these comments. Compliance with applicable rules is the responsibility of the affected owner or operator even if the work is performed by a third-party contractor. The fact that a company has elected to contract out work to a third party is not a justification for providing a relaxation of the rule requirements. The commission expects that companies verify their contractor's ability to provide compliant services as part of due diligence during negotiations.

Comment

ProAct commented that it understands §115.544(c)(2) to mean that if §115.542(a)(2), (3), or (4) is being used then the periodic testing requirements in §115.544(c)(2) do not apply.

Response

The commission agrees that the periodic testing requirement in §115.544(c)(2) does not apply to a portable control device used to comply with §115.542(a)(2) - (4).

Comment

TTOG requested deletion of the requirement in §115.544(c)(2) to periodically retest portable control devices. TTOG commented that control devices are already required to demonstrate control efficiency initially under §115.544(c)(1) and maintain adequate control efficiency under §115.542(a)(1) and there is no indication that control efficiency would meaningfully decrease over a device's useful life.

Response

The commission respectfully disagrees with the commentor's assertion that control efficiency will not decrease over the life of the equipment. Such an assumption is counter-intuitive given the complex nature of the pollution control equipment used to comply with this rule. Pollution control equipment is subject to normal wear and potential malfunctions that could affect the control efficiency over time. Portable equipment could be subject to greater than normal wear as result of numerous relocations and potential damage during transition. While the adopted rule includes monitoring requirements to ensure proper operation of the control equipment on an ongoing basis, the periodic testing provisions in the adopted rule provide an actual demonstration that the equipment is still meeting the required control efficiency without placing an undue burden on the owner or operator. Furthermore, the adopted rule does provide an option for the owner or operator to monitor the outlet VOC concentration of the control device in lieu of performing any control efficiency testing.

Comment

RSI commented that all combustion devices are not treated equally under this rule revision. RSI commented that flares have the least requirements for testing and monitoring and appear to only need supplemental fuel monitoring to comply. RSI commented that thermal oxidizers are exempt from periodic control efficiency demonstrations if the temperature is maintained at greater than 1400 degrees Fahrenheit with a 0.5 second residence time. RSI commented that in California and New Jersey engines are allowed to use an air fuel controller to maintain a stoichiometric operation that ensures the emissions to be under 50 ppmv, expressed as methane. RSI requested that engines to be exempted from periodic control efficiency demonstrations if a Phoenix oxygen sensor control feedback loop controller is installed and operating. RSI stated that if engines are not allowed the same exemption as thermal oxidizers, all combustion devices should have the same monitoring and sampling conditions and no technology should be exempted from source testing and monitoring.

Response

The adopted rule establishes monitoring and testing requirements appropriate for the particular type of control technology. The minimum temperature and residence time provisions for thermal oxidizers are well established and recognized operating conditions that ensure the device will meet the required control efficiency. The monitoring requirements in §115.544 for this type of control equipment are designed to demonstrate that the equipment is meeting the required operating condition; therefore, the need for an initial or periodic test to demonstrate control efficiency is unnecessary. These operating conditions are not established for an internal combustion engine. It would be arbitrary for the commission to require all control equipment to perform the same testing as an internal combustion engine regardless of the engineering and scientific principles that the technology is based upon.

In addition, internal combustion engines reduce VOC emissions by combustion and by catalytic oxidation through a catalytic converter. A catalytic converter converts unburned hydrocarbon from the internal combustion engine to carbon dioxide and water. Some internal combustion engines are equipped with an oxygen sensor to regulate the air fuel ratio to promote combustion; however, the oxygen sensor does not monitor the performance of the catalytic converter. Catalyst poisoning could occur when the catalytic converter is exposed to exhaust-containing substances that coat the working surfaces, encapsulating the catalyst so that it cannot contact and treat the exhaust. Periodic testing is warranted to ensure the proper operation of an engine and catalytic converter over a longer period of operation. The limited test data provided by the commentor does not provide an adequate justification for the commission to waive the periodic testing requirements for all engines used as control devices for this rulemaking.

However, in response to the commentor's concerns about overly burdensome requirements for internal combustion engines used as control equipment for the rule, the commission has reevaluated the monitoring requirements for engines and for other control devices that the owner or operator elects to comply with the VOC concentration limit in §115.542(a)(4). Since the performance of the control device should not change dramatically hour to hour, hourly monitoring could be burdensome to the control device operator. Therefore, the commission has revised the rule to require one exhaust gas VOC concentration measurement within one hour after beginning the degassing operation; the VOC concentration measurement must be a one-hour test run. By monitoring within one hour of the start of the operation, the exhaust gas concentration measured should reflect the VOC concentration is at its highest concentration, ensuring the control device will meet the VOC concentration limit in §115.542(a)(4) throughout the degassing operation. In addition, in response to these comments, the commission has added §115.544(b)(2)(I) specifying that for an internal combustion engine, the owner or operator shall continuously monitor the engine exhaust gas oxygen content throughout the degassing operation. The commission is also adopting §115.546(a)(2)(I) requiring the owner or operator to maintain records of the continuous engine exhaust gas oxygen content monitoring required in §115.544(b)(2)(I) if an internal combustion engine is used to comply with this division.

Comment

TxOGA suggested revising §115.544(c)(2) to require testing every 60 months for portable control devices by the owner of the equipment except for thermal oxidizers that meet certain temperature and combustion residence time requirements.

Response

No changes were made in response to this comment. As discussed elsewhere in this RESPONSE TO COMMENTS section, compliance with applicable rules is the responsibility of the affected owner or operator even if the work is performed by a third-party contractor. The rule does not prohibit the third-party contractor from performing the required testing and providing the regulated owner or operator with a copy of the documentation. Companies are free to negotiate such agreements with the contractors; however, the commission holds the regulated entity accountable for compliance with the rule. Additionally, as discussed elsewhere in this RESPONSE TO COMMENTS section, directly applying a mandatory requirement on the third-party contractors performing degassing services would be an expansion of the rule applicability and these newly affected parties would not have the opportunity to comment on such a change.

Comment

TxOGA requested that the exception for thermal oxidizers in §115.544(c)(2) be expanded to include vapor combustors, which are not always interpreted to be thermal oxidizers.

Response

The commission agrees that thermal oxidizers and vapor combustors may not always be interpreted the same and has revised §115.544(c)(2) to include a vapor combustor if the vapor combustor combustion chamber temperature is at least 1,400 degree Fahrenheit, and the flow rate of the VOC vapors routed to the device is limited to assure at least 0.5 second combustion chamber resident time all the time.

Comment

TCC requested the commission add §115.544(c)(4) to state that compliance demonstration testing for flares as required by §115.542(a)(2) is waived for flares that meet the installation and on-line monitoring requirements of §115.725(d).

Response

No changes were made in response to this comment. Section 115.542(a)(2) does not require compliance demonstration testing for flares; therefore, the suggested change is unnecessary.

Comment

TCC commented that for contractor-owned or leased equipment, if the contractor has conducted previous testing on the portable equipment being used at the site, then reciprocity for this contractor testing of portable control equipment should satisfy these rules concerning testing.

Response

No changes were made in response to this comment. Compliance with applicable rules is the responsibility of the affected owner or operator even if the work is performed by a third-party contractor. The rules do not preclude the owner or operator from using a performance test conducted by a third party to demonstrate compliance with the requirements in §115.544(c) as long as that test was conducted in accordance with the approved test methods in §115.545.

Section 115.545, Approved Test Methods

Comment

TTOG supported §115.545(4), allowing the use of Method 19 in connection with compliance testing for control devices; §115.545(14), allowing the use of minor modifications to approved test methods if approved by the executive director; and §115.545(15), allowing certain other test methods to be used if approved by the executive director.

Response

The commission appreciates the support.

Comment

Green Environmental commented that the requirement in §115.545(11) to use the higher of the actual storage temperature or 95 degrees Fahrenheit appears incorrect since the applicability in §115.540(a) states that the vapor pressure determination should occur at actual storage conditions. Green Environmental suggested revising §115.545(11) to state that if the actual temperature is not known, 95 degrees Fahrenheit should be used for the vapor pressure determination, but that if the temperature is higher than 95 degrees Fahrenheit, the higher temperature should be used. Green Environmental commented that a facility should not be prohibited from using a lower actual storage temperature.

NanoVapor supported using the higher of either 95 degrees Fahrenheit or the actual storage temperature for determining true vapor pressure of VOC.

TCC requested §115.545(11) be revised to remove the requirement to use a lower bound of 95 degrees Fahrenheit to determine true vapor pressure. TCC commented that this lower bound is substantially higher than would be expected for the actual storage temperature, unless the tank is heated. TCC added that while it is appropriate to account for the elevated temperature of a heated tank, it is completely arbitrary to impose a lower bound of 95 degrees Fahrenheit on unheated tanks. TCC commented that the specified procedure further stipulates that actual storage temperature is to be determined using the maximum monthly average temperature, rather than the average temperature of the month in which the degassing or cleaning activity takes place. TCC stated that this is a conservative approach, in that the true actual storage temperature would be lower during other months of the year, and given that the specified method of determining actual storage temperature is conservative, and a lower bound of 95 degrees Fahrenheit is arbitrary and unwarranted, the lower bound of 95 degrees Fahrenheit should be removed from the proposed rule. TCC added that, at a minimum, sites should be allowed to demonstrate that the actual storage temperature is less 95 degrees Fahrenheit.

TxOGA requested §115.545(11) be revised to remove the requirement to use the higher of 95 degrees Fahrenheit or actual storage conditions to determine true vapor pressure. TxOGA commented that Chapter 115 rules should ensure reasonable available control technology and therefore, should not be as stringent as the best available control technology requirements in the MSS permit model.

Response

The commission agrees with the comments and has revised §115.545(11). The true vapor pressure temperature can be determined by using either the measured actual temperature at the time when the tank or vessel is emptied or the maximum local monthly average ambient temperature as published by the Na-

tional Weather Service. The commission understands that the true vapor pressure will vary with the temperature. If the actual storage temperature is unknown, then the maximum local monthly average ambient temperature as published by the National Weather Service can be used.

Comment

Johann Haltermann commented that the requirement in §115.545(11) to determine the true vapor pressure using American Society for Testing and Materials (ASTM) methods is onerous, especially when pure chemicals are involved given that there is sufficient published data to show the true vapor pressure at various temperatures. Johann Haltermann requested the commission allow published data, such as Antoine Coeffients, to be used to calculate the true vapor pressure of pure products (greater than 98%). Johann Haltermann requested the commission allow Raoults Law to be used to calculate the vapor pressure of simple mixtures.

Green Environmental commented that the requirement in §115.545(11) should be revised to state that true vapor pressure for petroleum products must be determined using ASTM methods referenced. Green Environmental stated it should be clear that facilities' cleaning tanks that last held downstream chemicals are allowed to use documented vapor pressure data in published literature or as developed by their companies for their chemical products.

TTOG suggested that §115.545(11) should not require actual ASTM testing for vapor pressure determinations where such determinations can be made using standard reference materials.

Response

The commission agrees with the commentors and has revised §115.545(11) to allow the true vapor pressure to be determined either by using standard reference texts or using the ASTM methods listed. This change is also consistent with other similar provisions in Chapter 115 that allow the use of vapor pressure data from standard reference texts.

Comment

NanoVapor proposed using the calculated vapor pressure and the rated VOC destruction capability of the applied control device to estimate the degassing time. NanoVapor suggested requiring all control device operators to maintain records of these estimates, as well as actual degassing times.

Response

No changes were made in response to this comment. While the commentor's suggestions might provide beneficial information for the owner or operator of the tank or vessel being degassed, the information and associated records are not necessary to demonstrate compliance with the rule.

Comment

Johann Haltermann commented that §115.545(13) should specifically allow the use of an LEL meter on a bag sample.

Response

As discussed in the SECTION BY SECTION DISCUSSION and RESPONSE TO COMMENTS portions of this preamble, §115.544(b)(3) has been revised to allow the use of integrated bag samples for performing the VOC concentration measurements to demonstrate compliance with the limits in §115.542(b). The commission agrees that LEL meter should be allowed the same flexibility. The change to §115.544(b)(3) applies to VOC measurements made using a Method 21 analyzer as well as an LEL meter. Section 115.545(13) includes the analyzer specifications for using an LEL meter, and §115.544(b)(3) is the appropriate location in the rule to make this change.

Section 115.546, Recordkeeping and Notification Requirements

Comment

TxOGA recommended eliminating the recordkeeping requirement in §115.546(a)(1)(C). TxOGA commented that there is no apparent environmental benefit to be gained from requiring records of the quantity of recovered VOC. TxOGA stated that it is difficult to clearly distinguish between liquid and sludge during a tank-cleaning project, and irregularities in tank floors can result in inaccurate data. TxOGA added API Technical Report 2568 does not distinguish between liquid or sludge quantity.

Response

No changes were made in response to this comment. The recordkeeping requirements in §115.546(a)(1)(C) are existing provisions that the commission did not propose to make any changes. Removing the recordkeeping requirements is beyond the commission's intended scope of the rulemaking. Additionally, the commission notes that §115.546(a)(1)(C) only requires the estimated liquid quantity of VOC, similar to the language used in §115.546(a)(1)(B). The commission expects that the owners or operators would provide a reasonable estimate of the quantity but that an exact estimate is not needed for compliance with the rule.

Comment

TxOGA suggested that §115.546(a)(2)(G) be revised to include vapor combustors with thermal oxidizers since they are not always interpreted to be the same.

Response

As discussed elsewhere in this RESPONSE TO COMMENTS section, the commission agrees that thermal oxidizers and vapor combustors may not always be interpreted the same and has revised §115.546(a)(2)(G) to include a vapor combustor to be consistent with changes made to §115.544(b)(2)(G). A vapor combustor that is complying with the provisions in §115.544(b)(2)(G) must maintain the same records as a thermal oxidizer meeting the same monitoring conditions.

Comment

TCC commented that the recordkeeping requirements for contracted portable control equipment in §115.546(a)(4) should be the responsibility of the contractor.

Response

No changes were made in response to this comment. As discussed elsewhere in this RESPONSE TO COMMENTS section, compliance with applicable rules is the responsibility of the affected owner or operator even if the work is performed by a third-party contractor. Expanding the recordkeeping requirements to apply directly to the third-party contractors would be an expansion of the rule applicability, and these newly affected parties would not have been given the opportunity to comment on such a substantive change. Furthermore, the suggested change would undermine the commission's ability to verify compliance with the rule as the commission's investigators will need access to the records and may not be present at the site when the contractors are performing operations.

Comment

TTOG commented that requiring advance notification of degassing operations upon request in §115.546(b) is an appropriate alternative to requiring advance notifications for all degassing operations in the HGB area.

Response

The commission appreciates the support.

Comment

TxOGA suggested removing the requirement in §115.546(b) requiring advance notification of degassing operations upon request. TxOGA stated that there are other regulatory requirements for notifications of tank events and emission event notification when emissions exceed a reportable quantity per day. TxOGA added that since the commission already has the authority to request information and inspect facilities there is no purpose in restating that here.

Response

No changes were made in response to this comment. Advance notification of degassing operations will facilitate the enforcement of the rule by allowing investigators to observe the degassing operation while the tank or vessel is being degassed. Some existing notification requirements are for events that have already happened, and on-site observation is different from the records review. In addition, requiring notification to be provided only upon request eliminates unnecessary paperwork.

Section 115.547, Exemptions

Comment

TTOG suggested that a new exemption should be added to proposed §115.547 for products at temperatures for which degassing will never be necessary to achieve the target VOC concentration in §115.542(b). TTOG commented that for some products, vapor pressure may vary above or below 0.5 psia based on the season. TTOG added that if the vapor pressure is lower than 0.5 psia under actual storage conditions at the time of degassing, then the VOC concentration in the vapor space cannot exceed 34,000 ppmv, and degassing is superfluous. Green Environmental suggested retaining the 0.5 psia exemption in §115.547 to follow the format of most Chapter 115 regulations.

Response

No changes were made in response to these comments. Section 115.540(a) clearly states that this division applies to degassing during, or in preparation of, cleaning any storage tank, transport vessel, or marine vessel containing VOC with a true vapor pressure greater or equal to 0.5 psia under actual storage conditions. If the true vapor pressure for the product is less than 0.5 psia under actual storage conditions then the requirements in this division will not apply. The commission does not agree that it is necessary to add an exemption to the rule for sources that are not currently required to comply with the rule.

Section 115.549, Compliance Schedules

Comment

Green Environmental commented that while it is understandable that the commission views the proposed §115.544(b)(E) requirements merely as acceptable ways to demonstrate the already-required compliance with 40 CFR §60.18, time should be allowed in the compliance schedule for facilities to install instrumentation. Green Environmental commented that in EPA's regulations, continuous monitoring of flares is not required as a general rule, but discrete flare performance tests are often required; thus, it is not an immediate conclusion that the continuous monitoring requirements have been inherently required all along. Green Environmental commented that the commission has been inserting flare monitoring requirements into NSR permits for the past few years, and a compliance schedule is being allowed in the NSR permit conditions for those facilities that need to purchase or install instrumentation.

Response

The commission agrees that it is reasonable to grant additional time to the affected owners or operators if additional monitoring devices are needed to demonstrate compliance with the flare monitoring requirements in §115.5(b)(2)(E). In response to this comment, the compliance schedules in §115.549(b) and (d) have been revised to state that if the installation of additional monitoring equipment is necessary to comply with the requirements in §115.544(b)(2)(E), the owner or operator shall comply with the requirement no later than March 1, 2012, which is approximately one year after the effective date of this rulemaking. Until the monitoring equipment necessary to demonstrate compliance with the requirements in §115.544(b)(2)(E) is installed, the owner or operator shall demonstrate compliance by using engineering calculations or other available monitoring or testing data.

Comment

Green Environmental commented that §115.549 should allow HGB area facilities time to come into compliance with modifications to the Approved Test Methods in §115.545. Green Environmental commented that since the commission is deleting §115.545(11)(c), which allows bag sampling with portable monitors, some sources will need time to invoke the new §115.545 (14) and (15) if they are to use a vapor collection procedure that they developed in order to be able to use an LEL meter in a steam-cleaning (water-laden) environment. Green Environmental commented that the rules appear to allow bag sampling only in conjunction with a Method 18 gas chromatograph analysis.

Response

No changes were made in response to this comment. The commission respectfully does not agree that additional time is needed to comply with the new §115.545(14) and (15). Existing §115.545(11)(C) and (E) regarding bag samples and portable hydrocarbon gas analyzer have been integrated into §115.545(3) and (5), respectively because that language did not provide enough specificity to ensure appropriate use. Section 115.545(3) allows the owner or operator to collect VOC samples in bags by using the specified sampling procedure outlined in Method 18 and §115.545(5) allows the owner or operator to use Method 21 to determine the VOC concentrations as required in §115.542(b) and §115.544(b)(4).

30 TAC §§115.540 - 115.547, 115.549

STATUTORY AUTHORITY

The new and amended sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, con-

cerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new and amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new and amended sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new and amended sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The new and amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, and 382.017, and FCAA, 42 USC, §§7401 *et seq.*

§115.540. Applicability and Definitions.

(a) Applicability. Except as specified in §115.547 of this title (relating to Exemptions), this division applies to degassing during, or in preparation of, cleaning any storage tank, transport vessel, or marine vessel containing volatile organic compounds with a true vapor pressure greater than or equal to 0.5 pounds per square inch absolute under actual storage conditions. In this division, the operator of any storage tank, transport vessel, or marine vessel refers to the regulated entity performing or outsourcing the degassing operation.

(1) In the Beaumont-Port Arthur area, as defined in §115.10 of this title (relating to Definitions), this division applies to any storage tank, transport vessel, or marine vessel.

(2) In the Dallas-Fort Worth area, as defined in §115.10 of this title, this division applies to any storage tank or transport vessel in Collin, Dallas, Denton, and Tarrant Counties. This division does not apply to any tank or vessel in Ellis, Johnson, Kaufman, Parker, or Rockwall Counties.

(3) In the El Paso area, as defined in §115.10 of this title, this division applies to any storage tank or transport vessel.

(4) In the Houston-Galveston-Brazoria area, as defined in §115.10 of this title, this division applies to any storage tank, transport vessel, or marine vessel.

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §3.2, §101.1, or §115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply in this division unless the context clearly indicates otherwise.

(1) Cleaning--The process of washing or rinsing a storage tank, transport vessel, or marine vessel, or removing sludge or rinsing liquid from a storage tank, transport vessel, or marine vessel.

(2) Degassing--The process of removing volatile organic compounds vapor from a storage tank, transport vessel, or marine vessel during, or in preparation of, cleaning.

(3) Drain-dry floating roof tank--A floating roof tank designed to completely drain its entire contents to a sump in a manner that leaves no free-standing liquid in the tank or the sump.

(4) Recirculation system--A vapor-tight system that is composed of piping, ductwork, connections, flow inducing devices, and a control device. The recirculation system conducts volatile organic compounds vapor from a storage tank, transport vessel, or marine vessel to a control device and conducts the exhaust from the outlet of the control device back into the same tank or vessel. The recirculation system does not include the storage tank, transport vessel, or marine vessel that is being degassed.

(5) Storage capacity--The volume of a storage tank as determined by multiplying the internal cross-sectional area of the tank by the average internal height of the tank shell or the volume of a transport vessel or marine vessel as determined by the manufacturer's original design capacity.

(6) Storage tank--A stationary vessel, reservoir, or container used to store volatile organic compounds. This definition does not include: components that are not directly involved in the containment of liquids or vapors; subsurface caverns or porous rock reservoirs; or process tanks or vessels.

(7) Vapor-tight--A condition that exists when no component of a system has a leak greater than 500 parts per million expressed as methane measured using Method 21 (40 Code of Federal Regulations Part 60, Appendix A-7).

§115.541. Emission Specifications.

(a) All volatile organic compounds (VOC) vapors from a storage tank, transport vessel, or marine vessel subject to this division must be routed to a control device in accordance with the requirements in §115.542 of this title (relating to Control Requirements) during degassing operations unless the VOC concentration, measured in accordance with the procedure described in §115.544(b)(3) of this title (relating to Inspection, Monitoring, and Testing Requirements), is less than 34,000 parts per million by volume (ppmv) expressed as methane or 50% of the lower explosive limit.

(b) The intentional bypassing of a control device used to comply with this division is prohibited. Any visible VOC leak originating from the control device, or other associated product recovery device, must be repaired as soon as practical.

(c) No avoidable liquid or gaseous leaks, as detected by sight or sound, may originate from the degassing operation.

(d) In addition to the requirements in subsections (a) - (c) of this section, a transport vessel must be kept vapor-tight at all times until the VOC vapors are routed to a control device.

(e) In addition to the requirements in subsections (a) - (c) of this section, a marine vessel must:

(1) have all cargo tank closures properly secured or maintain a negative pressure within the vessel when a closure is opened; and

(2) have all pressure or vacuum relief valves operating within certified limits, as specified by classification society or flag state, until the VOC vapors are routed to a control device.

(f) In addition to the requirements in subsections (a) - (c) of this section, all VOC vapors from a floating roof storage tank that is not a drain-dry floating roof storage tank must be routed to a control device as soon as practical but no later than:

(1) 24 hours after the tank has been emptied to the extent practical or the drain pump loses suction for a floating roof storage tank containing VOC liquids with a true vapor pressure greater than or equal to 1.5 pounds per square inch absolute (psia) under actual storage conditions;

(2) 72 hours after the tank has been emptied to the extent practical or the drain pump loses suction for a floating roof storage tank containing VOC liquids with a true vapor pressure less than 1.5 psia under actual storage conditions; or

(3) the time limit specified in a permit issued under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) up to a maximum of 72 hours after the tank has been emptied to the extent practical or the drain pump loses suction.

§115.542. Control Requirements.

(a) A control device used to comply with §115.541 of this title (relating to Emission Specifications) must meet one of the following conditions at all times when volatile organic compounds (VOC) vapors are routed to the device.

(1) The control device must maintain a control efficiency of at least 90% and must be operated in a manner consistent with how the device was operated during the control efficiency demonstration required in §115.544(c) of this title (relating to Inspection, Monitoring, and Testing Requirements).

(2) The control device must be a flare that is designed and operated in accordance with 40 Code of Federal Regulations §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and is lit at all times when VOC vapors are routed to the flare.

(3) The control device must be a recirculation system that does not cause the pressure inside the tank or vessel to increase by more than one inch water pressure above atmospheric pressure at any time during the degassing operation.

(4) The VOC concentration at the outlet of the control device must be less than 500 parts per million by volume (ppmv) at 0% oxygen, dry basis, expressed as methane.

(b) All VOC vapors must be routed to a control device until the VOC concentration is less than 34,000 ppmv expressed as methane or less than 50% of the lower explosive limit. After one of the conditions has been satisfied, the tank or vessel may be vented to the atmosphere without control for the remainder of the degassing operation, except as specified in §115.544(b)(4) of this title.

(c) Degassing equipment must be designed and operated to prevent avoidable liquid or gaseous VOC leaks.

(d) When degassing is effected through the hatches or manways of a storage tank, all lines must be equipped with fittings that make vapor-tight connections.

(e) When degassing is effected through the hatches of a transport vessel with a loading arm equipped with a vapor collection adapter, then pneumatic, hydraulic, or other mechanical means must be provided to force a vapor-tight seal between the adapter and the hatch. A means must be provided to minimize liquid drainage from the degassing equipment when it is removed from the hatch or to accomplish drainage before such removal.

(f) When degassing is effected through the hatches of a marine vessel with a loading arm equipped with a vapor collection adapter, then pneumatic, hydraulic, or other mechanical means must be provided to force a vapor-tight seal between the adapter and the hatch, or a negative pressure inside the cargo tank must be maintained. A means must be provided to minimize liquid drainage from the degassing equipment when it is removed from the hatch or to accomplish drainage before such removal.

§115.544. Inspection, Monitoring, and Testing Requirements.

(a) Inspection requirements. The following inspection requirements apply during the degassing of any storage tank, transport vessel, or marine vessel subject to this division.

(1) Inspection for visible liquid leaks, visible fumes, or significant odors resulting from volatile organic compounds (VOC) transfer operations must be conducted during each degassing operation.

(2) Degassing through the affected transfer lines must be discontinued when a leak is observed and the leak cannot be repaired within a reasonable length of time.

(b) Monitoring requirements. The following monitoring requirements apply during the degassing of any storage tank, transport vessel, or marine vessel subject to this division. Monitoring at least once every 15 minutes is sufficient to demonstrate compliance with the continuous monitoring requirements in this subsection.

(1) Any monitoring device used to comply with this subsection must be installed, calibrated, maintained, and operated according to the manufacturer's instructions.

(2) The owner or operator shall monitor any operational parameters necessary to demonstrate the proper functioning of a control device used to comply with this division at all times when VOC vapors are routed to the device.

(A) For a carbon adsorption system, the owner or operator shall continuously monitor the exhaust gas VOC concentration of any carbon adsorption system that regenerates the carbon bed directly to determine breakthrough. Alternatively, the owner or operator shall periodically monitor the exhaust gas VOC determine breakthrough and switch the exhaust gas flow to fresh carbon for any carbon adsorption system that does not regenerate the carbon bed directly, as specified by 40 Code of Federal Regulations (CFR) §61.354(d) (as amended through October 17, 2000 (65 FR 62160)), except that any monitoring must be conducted at intervals no greater than 20% of the design carbon replacement interval. For the purpose of this division, breakthrough is defined as a measured VOC concentration exceeding 100 parts per million by volume (ppmv) above background expressed as methane.

(B) For a catalytic incinerator, the owner or operator shall continuously monitor the inlet and outlet gas temperature.

(C) For a condensation system, the owner or operator shall continuously monitor the outlet gas temperature to ensure the temperature is below the manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device.

(D) For a direct-flame incinerator, the owner or operator shall continuously monitor the exhaust gas temperature immediately downstream of the device.

(E) For a flare, the owner or operator shall use one of the following methods to demonstrate compliance with the requirements in 40 CFR §60.18 (as amended through December 22, 2008 (73 FR 78209)).

(i) The owner or operator shall continuously monitor the net heating value of the gas stream routed to the flare.

(ii) The owner or operator shall continuously monitor the total volume of supplemental fuel added to the gas stream routed to the flare and continuously maintain sufficient supplemental fuel to meet the minimum net heating value requirements in 40 CFR

§60.18 assuming that the net heating value contribution from the degassed VOC vapor is equivalent to a level corresponding to 50% of the lower explosive limit (LEL). The owner or operator may estimate the volumetric flow rate from the tank or vessel for the purpose of this calculation if the flow rate of the degassed VOC vapor is not directly monitored.

(iii) The owner or operator shall use calculations to demonstrate that for the material stored in the tank or vessel the net heating value of the gas stream routed to the flare cannot drop below the minimum net heating value requirements in 40 CFR §60.18 until the concentration of VOC in the vapors being routed to the flare is less than the concentration limits in §115.542(b) of this title (relating to Control Requirements).

(iv) If the flare is a non-assisted flare that qualifies for the provisions in 40 CFR §60.18(c)(3)(i), the owner or operator may elect to continuously monitor the hydrogen content of the gas stream routed to the flare and continuously meet the minimum 8.0% by volume hydrogen content requirement in lieu of the requirements in clauses (i) - (iii) of this subparagraph.

(F) For any control device used to comply with the optional exhaust gas concentration limit in §115.542(a)(4) of this title, the owner or operator shall monitor the exhaust gas VOC concentration within one hour after beginning the degassing operation. The VOC concentration measurement must be a one-hour test run using one of the following methods:

(i) the integrated bag sampling procedure in Method 18 (40 CFR Part 60, Appendix A), §§8.2.1.1 - 8.2.1.4, and a total hydrocarbon analyzer that meets instrument and calibration specifications in Method 21; or

(ii) Method 25A (40 CFR Part 60, Appendix A) to monitor the exhaust gas VOC concentration.

(G) For a thermal oxidizer or vapor combustor, the owner or operator shall continuously monitor the combustion chamber temperature. If necessary to demonstrate compliance with subsection (c)(3) of this section, the owner or operator shall also continuously monitor the gas flow rate into the thermal oxidizer or vapor combustor to determine the combustion chamber residence time.

(H) For a recirculation system, the owner or operator shall:

(i) continuously monitor the pressure inside the tank or vessel or continuously monitor the gas flow rate at the inlet and outlet of the control device; and

(ii) monitor all components of the recirculation system, including all valves and connectors, for VOC leaks using the procedure in Method 21 (40 CFR Part 60, Appendix A-7) and begin this monitoring within one hour after beginning any degassing operation. A leak is defined as a screening concentration greater than 500 ppmv above background as methane for all components.

(I) For an internal combustion engine, the owner or operator shall continuously monitor the engine exhaust gas oxygen content throughout the degassing operation.

(J) For a control device not listed in this paragraph, the owner or operator shall continuously monitor one or more operational parameters sufficient to demonstrate proper functioning of the control device to design specifications.

(3) The owner or operator shall monitor the VOC concentration to demonstrate compliance with the VOC concentration or percent LEL thresholds in §115.542(b) of this title and determine if the storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control for the remainder of the degassing operation, except as specified in paragraph (4) of this subsection. The VOC concentration must be monitored:

(A) once per minute for at least five minutes and all measurements must be less than the VOC concentration limits in §115.542(b) of this title; or

(B) over a five-minute period using the integrated bag sampling procedure in Method 18 (40 CFR Part 60, Appendix A) §§8.2.1.1 - 8.2.1.4 and the integrated measurement must be less than the VOC concentration limits in §115.542(b) of this title.

(4) After demonstrating compliance with the applicable VOC concentration or percent LEL thresholds in §115.542(b) of this title in accordance with paragraph (3) of this subsection, the owner or operator of any storage tank, transport vessel, or marine vessel shall comply with one of the following conditions.

(A) The VOC concentration inside the tank or vessel must be monitored once every 12 hours while venting to the atmosphere without control until five consecutive measurements collected at 12 hour intervals are measured to be less than 34,000 ppmv expressed as methane or less than 50% of the LEL. The VOC concentration measurement required by paragraph (3) of this subsection may be considered the first of these five consecutive measurements.

(i) If venting to the atmosphere without control has been suspended for more than four hours, the VOC concentration inside the tank or vessel must be measured upon restart of the degassing operation.

(ii) If any of the VOC concentration measurements equal or exceed 34,000 ppmv expressed as methane or 50% of the LEL, the tank or vessel must be routed to the control device until the VOC concentration is below 34,000 ppmv expressed as methane or less than 50% of the LEL as determined by subsection (b)(3) of this section.

(iii) If the measured VOC concentration is less than 6,800 ppmv expressed as methane or 10% of the LEL then no further VOC concentration measurements are required.

(B) The storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control for the remainder of the degassing operation and no further VOC measurements are required if the VOC concentration inside the tank or vessel is less than 6,800 ppmv expressed as methane or 10% of the LEL before the owner or operator stops routing the VOC vapors to a control device in accordance with §115.541 of this title (relating to Emission Specifications) and §115.542 of this title.

(5) Minor modifications to the monitoring methods specified in this section may be approved by the executive director. Monitoring methods other than those specified in this section may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Method 301.

(6) The sampling location for monitoring the VOC concentration as required by subsection (b)(3) of this section should be immediately before the control device or in the transfer line connecting from the tank or vessel to the control device. The owner or operator may elect to monitor the VOC concentration at a location inside the vapor space of the tank or vessel provided the location is representative of the VOC concentration entering the control device.

(c) Testing requirements. The following testing requirements apply to the owner or operator of any storage tank, transport vessel, or marine vessel subject to the requirements in this division if a control

device is used to comply with the emission specifications in §115.541 of this title.

(1) For a control device used to comply with the requirements in §115.542(a)(1) of this title, an initial control efficiency demonstration must be conducted in accordance with the approved test methods in §115.545 of this title (relating to Approved Test Methods) and the device must be retested after any modification that could reasonably be expected to decrease the efficiency of a control device within 60 days after the modification or before being used to comply with the requirements in §115.542(a)(1) of this title, whichever is longer.

(2) For a portable control device used to comply with the requirements in §115.542(a)(1) of this title, a periodic control efficiency demonstration must be conducted at least once every 60 months in accordance with the approved test methods in §115.545 of this title.

(3) For a portable thermal oxidizer or vapor combustor used to comply with the requirements in §115.542(a)(1) of this title, the periodic control efficiency demonstration in paragraph (2) of this subsection will not be required if the combustion chamber temperature is at least 1,400 degrees Fahrenheit and the flow rate of the VOC vapors routed to the device is limited to assure at least a 0.5 second combustion chamber residence time at all times when the device is in use.

§115.545. Approved Test Methods.

Compliance with the requirements in this division must be determined by applying one or more of the following test methods or procedures, as appropriate.

(1) Methods 1 - 4 (40 Code of Federal Regulations (CFR) Part 60, Appendix A) must be used for determining flow rates.

(2) Methods 3, 3A, or 3B (40 CFR Part 60, Appendix A) must be used to determine exhaust gas oxygen (O_2) concentration for making any O_2 corrections necessary for §115.542(a)(4) of this title (relating to Control Requirements).

(3) Method 18 (40 CFR Part 60, Appendix A) must be used for determining gaseous organic compound emissions by gas chromatography.

(A) If Method 18 is used to demonstrate compliance with the volatile organic compounds (VOC) concentration monitoring requirements in §115.542(b) of this title and §115.544(b)(4) of this title (relating to Inspection, Monitoring, and Testing Requirements), only one bag sample needs to be collected for each concentration measurement.

(B) If Method 18 is used to demonstrate compliance with the VOC concentration monitoring requirements in §115.544(b)(2)(F) of this title for an internal combustion engine or any control device used to comply with the option in §115.542(a)(4) of this title to limit exhaust concentration, the VOC concentration must be determined by using the integrated bag sampling procedure in Method 18, §§8.2.1.1 - 8.2.1.4.

(4) Method 19 (40 CFR Part 60, Appendix A) may be used for determining exhaust gas flow rates on combustion control devices in lieu of using Methods 1 - 4.

(5) Method 21 (40 CFR Part 60, Appendix A-7) must be used for determining VOC leaks. An instrument meeting the specifications and calibration requirements in Method 21 may be used for demonstrating compliance with the VOC concentration monitoring requirements in §115.542(b) and §115.544(b)(3) and (4) of this title with the provision that the instrument response factor criteria in §8.1 of Method 21 may be determined using the average composition of the liquid in the tank rather than for each individual liquid.

(6) Method 25 (40 CFR Part 60, Appendix A) must be used for determining total gaseous nonmethane organic emissions as carbon.

(7) Methods 25A or 25B (40 CFR Part 60, Appendix A) must be used for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis.

(8) Method 27 (40 CFR Part 60, Appendix A) must be used for determining tank-truck leaks.

(9) A portable O_2 analyzer that is calibrated, maintained, and operated according to the manufacturer's instructions may be used to determine exhaust gas O_2 concentration for making any O_2 corrections necessary for §115.542(a)(4) of this title in lieu of using Methods 3, 3A, or 3B.

(10) Additional test procedures described in 40 CFR §60.503(b) - (d) (effective February 14, 1989) must be used for determining compliance for bulk gasoline terminals.

(11) True vapor pressure must be determined using standard reference texts or American Society for Testing and Materials Test Method D323, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for actual storage temperature in accordance with American Petroleum Institute Publication 2517, Third Edition, 1989. For the purposes of temperature correction, the owner or operator shall use the actual storage temperature. Actual storage temperature of an unheated tank or vessel may be determined using the maximum local monthly average ambient temperature as reported by the National Weather Service. Actual storage temperature of a heated tank or vessel must be determined using either the measured temperature or the temperature set point of the tank or vessel.

(12) The test procedures in 40 CFR §63.565(c) or §61.304(f) must be used for determination of marine vessel vapor tightness.

(13) Lower explosive limit (LEL) detectors may be used for the percent LEL concentration measurement required by §115.542(b) and §115.544(b)(3) and (4) of this title, if the detector is calibrated and maintained according to manufacturer's specifications.

(14) Minor modifications to the test methods in this section may be used if approved by the executive director.

(15) Test methods other than those specified in this section may be used if validated by 40 CFR Part 63, Appendix A, Test Method 301 and approved by the executive director.

§115.546. Recordkeeping and Notification Requirements.

(a) Recordkeeping requirements. The owner or operator of any volatile organic compounds (VOC) storage tank, transport vessel, or marine vessel subject to the requirements in this division shall maintain the following records on site for at least two years. Any records created on or after March 1, 2009, must be maintained on site for at least five years. The owner or operator shall make these records available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

(1) For storage tank, transport vessel, or marine vessel degassing operations subject to the requirements in this division, the owner or operator shall maintain records of:

(A) the type and number of storage tanks, transport vessels, and marine vessels that are degassed;

(B) the chemical name and estimated liquid quantity of VOC contained in each storage tank, transport vessel, or marine vessel prior to degassing;

(C) the chemical name and estimated liquid quantity of VOC removed from each storage tank, transport vessel, or marine vessel;

(D) the VOC concentration or percent of lower explosive limit measurements required in §115.544(b)(3) of this title (relating to Inspection, Monitoring, and Testing Requirements) to determine when the storage tank, transport vessel, or marine vessel can be vented to the atmosphere without control; and

(E) the VOC concentration or percent of lower explosive limit measurements required by §115.544(b)(4) of this title.

(2) For a control device used to comply with the requirements in this division, the owner or operator shall maintain records of any operational parameter monitoring required in §115.544(b)(2) of this title. These records must include, but are not limited to, the following.

(A) For a carbon adsorption system, the owner or operator shall maintain records of the VOC concentration measurements required by §115.544(b)(2)(A) of this title.

(B) For a catalytic incinerator, the owner or operator shall maintain records of the continuous temperature monitoring required in §115.544(b)(2)(B) of this title.

(C) For a condensation system, the owner or operator shall maintain records of the continuous temperature monitoring required in §115.544(b)(2)(C) of this title.

(D) For a direct-flame incinerator, the owner or operator shall maintain records of the continuous temperature monitoring required in §115.544(b)(2)(D) of this title.

(E) For a flare, the owner or operator shall maintain records of the continuous monitoring or calculations required in §115.544(b)(2)(E) of this title.

(F) For any control device used to comply with the optional exhaust concentration limit in §115.542(a)(4) (relating to Control Requirements) of this title, the owner or operator shall maintain records of the VOC concentration measurement required in §115.544(b)(2)(F) of this title and records of the monitoring method used.

(G) For a thermal oxidizer or vapor combustor, the owner or operator shall maintain records of the continuous temperature monitoring required in §115.544(b)(2)(G) of this title. If necessary to demonstrate compliance with §115.544(c)(3) of this title, the owner or operator shall maintain records of the continuous monitoring of the gas flow rate into the thermal oxidizer or vapor combustor to determine the combustion chamber residence time.

(H) For a recirculation system, the owner or operator shall maintain records of the continuous pressure or flow rate monitoring required in §115.544(b)(2)(H)(i) of this title and records of the VOC leak monitoring required in §115.544(b)(2)(H)(ii) of this title, including the VOC measurements and the time the monitoring began.

(I) For an internal combustion engine, the owner or operator shall maintain records of the continuous engine exhaust gas oxygen content monitoring required in §115.544(b)(2)(I) of this title.

(J) For a control device not listed in this paragraph, the owner or operator shall maintain records of the continuous operational parameter monitoring required in §115.544(b)(2)(J) of this title sufficient to demonstrate proper functioning of the control device to design specifications.

(3) The owner or operator shall maintain records of the results of any leak inspection and repair conducted in accordance with the requirements in §115.544(a) of this title.

(4) The owner or operator shall maintain records of any control efficiency demonstration required in §115.544(c) of this title and the results of any testing conducted in accordance with the provisions specified in §115.545 of this title (relating to Approved Test Methods). The records must contain all applicable requirements from the commission's *Sampling Procedures Manual, Chapter 14.0, Contents of Sampling Reports* (January 2003, revision one).

(5) The owner or operator shall maintain records of the manufacturer's instructions for installation, calibration, maintenance, and operation for any monitoring device used to comply with the requirements in this division.

(b) Notification requirements. In the Houston-Galveston-Brazoria area, upon request by authorized representatives of the executive director, the owner or operator of any storage tank, transport vessel, or marine vessel subject to this division shall notify the appropriate regional office of upcoming degassing operations.

§115.549. Compliance Schedules.

(a) All affected owners or operators in Brazoria, Chambers, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, and Waller Counties were required to be in compliance with this division by November 15, 1996, and shall continue to comply with this division.

(b) All affected owners or operators in Collin, Dallas, Denton, and Tarrant Counties shall be in compliance with this division as soon as practicable, but no later than May 21, 2011. If the installation of additional monitoring equipment is necessary to comply with the requirements in §115.544(b)(2)(E) of this title (relating to Inspection, Monitoring, and Testing Requirements), the owner or operator shall comply with the requirements no later than March 1, 2012. Until the monitoring equipment necessary to demonstrate compliance with the requirements in §115.544(b)(2)(E) of this title is installed, the owner or operator shall demonstrate compliance by using engineering calculations or other available monitoring or testing data.

(c) All affected owners or operators in El Paso County shall be in compliance with this division as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the National Ambient Air Quality Standard for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the 1990 Amendments to the Federal Clean Air Act, §172(c)(9).

(d) All affected owners or operators in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall comply with the requirements in §§115.542(b), 115.544(b)(4), and 115.546(a)(1)(E) of this title (relating to Control Requirements; Inspection, Monitoring, and Testing Requirements; and Recordkeeping and Notification Requirements) as soon as practicable but no later January 1, 2009. If the installation of additional monitoring equipment is necessary to comply with the requirements in §115.544(b)(2)(E) of this title, the owner or operator shall comply with the requirements no later than March 1, 2012. Until the monitoring equipment necessary to demonstrate compliance with the requirements in §115.544(b)(2)(E) of this title is installed, the owner or operator shall demonstrate compliance by using engineering calculations or other available monitoring or testing data.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100384
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: February 17, 2011
Proposal publication date: August 13, 2010
For further information, please call: (512) 239-0779

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30 TAC §§115.541, 115.542, 115.545

STATUTORY AUTHORITY

The repealed sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeals are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The repeals are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit SIP revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021, and FCAA, 42 USC, §§7401 *et seq.*

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 28, 2011.

TRD-201100385
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: February 17, 2011
Proposal publication date: August 13, 2010
For further information, please call: (512) 239-0779

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 1. EXECUTIVE ADMINISTRATION
SUBCHAPTER C. PROCEDURE FOR PATENTING LAND

31 TAC §1.23

The General Land Office (GLO) adopts an amendment to §1.23, concerning Payment for Land. This amendment is adopted without changes to the proposal as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10902) and will not be republished.

BACKGROUND AND REASONED JUSTIFICATION

The intent of this rulemaking is to incorporate and provide consistency with the statutory changes made during the 81st Legislative Regular Session by House Bill (HB) 3461 (Acts 2009, 81st Leg., Ch. 1175, §§20, 21, eff. June 19, 2009) which amended Texas Natural Resources Code §51.070 (relating to Unpaid Principal on Public School Land Sales), and to clarify agency rules related to procedures for patenting land.

§1.23. Payment for Land.

Currently, §1.23 states that payment for land shall be made in full and based upon exact acreage. The adopted amendment clarifies that payment in full shall include all principal, accrued interest, late charges, other fees and expenses. This amendment conforms the rule to the provisions of Texas Natural Resources Code §51.070(b), which states that no patent may be issued for any public school land until such payment has been made.

The justification for adoption of the amendment is that the amendment provides clarification to the rules related to procedures for patenting land and, more specifically, what constitutes payment for land in full, and incorporates changes consistent with those made by the Texas Legislature to the GLO's governing statutes.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment to Chapter 1 is not anticipated to adversely affect in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rulemaking implements legislative changes to Texas Natural Resources Code §51.070(b), related to payments made for patents issued on public school land.

CONSISTENCY WITH CMP

The adopted rulemaking is not subject to the Coastal Management Program ("CMP"), as outlined in 31 TAC §505.11, relating to the Actions and Rules Subject to the CMP.

PUBLIC COMMENTS

No comments were received on the adopted amendments.

STATUTORY AUTHORITY

The amendment is adopted under Texas Natural Resources Code §51.070 and §51.014, which provides that the Commissioner may adopt rules necessary to carry out the provisions of that chapter and to alter or amend those rules to protect the public interest.

Texas Natural Resources Code §51.070 is affected and implemented by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100362
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: February 16, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 475-1859

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CHAPTER 13. LAND RESOURCES

The General Land Office (GLO) adopts an amendment to Chapter 13, (relating to Land Resources), Subchapter A (relating to Rules, Practice, and Procedure for Land Leases and Trades), §13.1 (relating to Leases). The GLO also adopts new §13.21 (relating to State-Owned Riverbeds and Beds of Navigable Streams) under Subchapter B (relating to Rights-Of-Way Over Public Lands) of Chapter 13. The amendment and new section are adopted without changes to the proposal as published in the November 26, 2010, issue of the *Texas Register* (35 TexReg 10421) and will not be republished.

BACKGROUND AND REASONED JUSTIFICATION

§13.1. Leases.

The amendment to §13.1 is adopted in order to correctly identify and reference 31 TAC §13.18, which sets forth the fees and terms for surface leases of public lands, and to correct a typographical error which misstates the name of the General Land Office.

§13.21. State-Owned Riverbeds and Beds of Navigable Streams.

This new section is adopted in order to create agency guidelines for issuing easements or leases for commercial and non-commercial improvements constructed on, across, through or under non-tidally influenced state-owned riverbeds and beds of navigable streams in the public domain, in accordance with the statutory scheme set forth in Chapter 51, Subchapter G of the Texas Natural Resources Code. These guidelines also seek to provide the public with more certainty and clarity related to this process and to establish consistency with current agency practices and procedures.

Section 13.21 provides that certain private, non-commercial improvements and structures constructed prior to September 1, 1993 upon state-owned riverbeds or beds of navigable streams (such as dams, low water crossings, docks, piers, groins, bulkheads, guy and tie-down cables, boat houses, or similar structures) will be considered properly permitted without further action or payment of fee by the owner. However, any modification of such a structure made after that date and which results in expanding its footprint upon state land will automatically void the permit granted by this section and require the owner to obtain an easement, lease, permit or other authorization from the GLO in accordance with statutory requirements. Failure to do so may subject the structure to the provisions of Texas Natural Resources Code §51.302 and §51.3021, related to penalties for and the removal of unauthorized structures on state lands.

Section 13.21 also refers to §13.17 (relating to Fees for Right-of-Way Easements) and §13.18 (relating to Fees for Surface Leases for Certain Facilities) for determining the appropriate fees for instruments issued under this section.

Section 13.21 also states that nothing contained therein shall be construed so as to limit the authority of the Commissioner of the GLO as contained in Texas Natural Resources Code Chapter 33 (relating to the Management of Coastal Public Land) or Chapter 51 (relating to Land, Timber and Surface Resources).

The justification for adoption of the amendment and new section is that it provides the public with more certainty and clarity in the process of issuing leases and easements upon state-owned lands. Moreover, owners of certain types of private, non-commercial improvements and structures built prior to September 1, 1993 upon state-owned riverbeds or beds of navigable streams in the public domain will be additionally served by the adopted rulemaking, which considers those structures automatically permitted without further action or payment of fee by the owner, inasmuch as the cost of pursuing enforcement against those structures would outweigh the revenue generated.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 13 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

CONSISTENCY WITH CMP

The adopted rulemaking is not subject to the CMP, 31 TAC §505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP, as the rulemaking applies only to non-tidally influenced state-owned riverbeds and beds of navigable streams in the public domain, which lie outside the coastal zone as described in 31 TAC §503.1 (relating to the Coastal Management Program Boundary).

PUBLIC COMMENTS

No comments were received on the adopted rulemaking.

SUBCHAPTER A. RULES, PRACTICE, AND PROCEDURE FOR LAND LEASES AND TRADES

31 TAC §13.1

STATUTORY AUTHORITY

The amendments to §13.1 are adopted under Texas Natural Resources Code §51.291, which authorizes the Commissioner to execute grants of easements or other interests in property for rights-of-way or access across, through, and under state-owned riverbeds and beds of navigable streams in the public domain for certain purposes and for any purpose the commissioner considers to be in the best interest of the state; §51.292, which authorizes the Commissioner to execute grants of easements or leases for certain purposes and for any other purpose the commissioner determines to be in the best interest of the state, to be located on state land other than land owned by the University of Texas System; and §51.014, which authorizes the Commissioner to adopt rules necessary to carry out the provisions of that chapter and to alter or amend rules to protect the public interest.

Texas Natural Resources Code §51.291 and §51.292 are affected and implemented by the adopted rulemaking.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100363
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: February 16, 2011
Proposal publication date: November 26, 2010
For further information, please call: (512) 475-1859

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SUBCHAPTER B. RIGHTS-OF-WAY OVER PUBLIC LANDS

31 TAC §13.21

New §13.21 is adopted under Texas Natural Resources Code §51.291, which authorizes the Commissioner to execute grants of easements or other interests in property for rights-of-way or access across, through, and under state-owned riverbeds and beds of navigable streams in the public domain for certain purposes and for any purpose the commissioner considers to be in the best interest of the state; §51.292, which authorizes the Commissioner to execute grants of easements or leases for certain purposes and for any other purpose the commissioner determines to be in the best interest of the state, to be located on state land other than land owned by the University of Texas System; and §51.014, which authorizes the Commissioner to adopt rules necessary to carry out the provisions of that chapter and to alter or amend rules to protect the public interest.

Texas Natural Resources Code §51.291 and §51.292 are affected and implemented by the adopted rulemaking.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100364
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Effective date: February 16, 2011
Proposal publication date: November 26, 2010
For further information, please call: (512) 475-1859

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

SUBCHAPTER K. CARRYING OF WEAPONS

37 TAC §§341.80 - 341.91

The Texas Juvenile Probation Commission (TJPC) adopts new Subchapter K, §§341.80 - 341.91, concerning juvenile probation officers carrying weapons. The new rules are adopted without changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10908) and will not be republished.

TJPC adopts the new rules in an effort to further the safe and lawful implementation of juvenile probation officers carrying a firearm in the course of their duties pursuant to Senate Bill 1237 (81R).

No public comment was received during the official public comment period.

The new rules are adopted under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100341
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: March 1, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 424-6710

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CHAPTER 348. JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAMS

The Texas Juvenile Probation Commission (TJPC) adopts the repeal of Chapter 348, §§348.1 - 348.15, 348.18, 348.19, and 348.30 - 348.33, concerning standards for juvenile justice alternative education programs. The repeal is adopted without changes to the proposal as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10911) and will not be republished.

TJPC adopts the repeal in an effort not to overlap with new Chapter 348 rules, which provide structural and substantive changes from the current standards.

No public comment was received during the official public comment period.

SUBCHAPTER A. PROGRAM OPERATIONS

37 TAC §§348.1 - 348.15, 348.18, 348.19

The repeal is adopted under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100342
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: August 1, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 424-6710

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SUBCHAPTER B. ACCOUNTABILITY

37 TAC §§348.30 - 348.33

The repeal is adopted under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100343
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: August 1, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 424-6710

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CHAPTER 348. JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAMS

The Texas Juvenile Probation Commission (TJPC) adopts new Chapter 348, §§348.100 - 348.102, 348.104, 348.106, 348.108, 348.110, 348.112, 348.114, 348.116, 348.118, 348.120, 348.122, 348.124, 348.126, 348.128, 348.130, 348.132, 348.134, 348.136, 348.138, 348.200, 348.202, 348.204, and 348.206, concerning juvenile justice alternative education programs. Section 348.101 is adopted with changes to the proposed text as published in the December 10, 2010, issue of the *Texas Register* (35 TexReg 10912) and will be republished. The remaining new sections are adopted without changes and will not be republished.

TJPC adopts the new rules in an effort to enhance the existing rules currently in place for juvenile justice alternative education programs.

No public comment was received during the official public comment period.

SUBCHAPTER A. PROGRAM OPERATIONS

37 TAC §§348.100 - 348.102, 348.104, 348.106, 348.108, 348.110, 348.112, 348.114, 348.116, 348.118, 348.120, 348.122, 348.124, 348.126, 348.128, 348.130, 348.132, 348.134, 348.136, 348.138

The new rules are adopted under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

§348.101. Interpretation and Applicability.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards in this chapter.

(b) Including. The word "including", when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but, rather, as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

(c) Applicability. This chapter applies to JJAEPs operated under §37.011 of the Texas Education Code and who receive funds from the Texas Juvenile Probation Commission for the operation of a JJAEP.

Furthermore, all standards requiring written policies and procedures are expected to be implemented and practiced.

(d) Compliance Resource Manual and Implementation of Agency Policy. The Commission may establish by administrative rule or other reasonable agency policy, the required guidelines, procedures, and documentation necessary to ensure compliance and verification of the standards set forth in this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100344
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: August 1, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 424-6710

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SUBCHAPTER B. ACCOUNTABILITY

37 TAC §§348.200, 348.202, 348.204, 348.206

The new rules are adopted under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 27, 2011.

TRD-201100345
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: August 1, 2011
Proposal publication date: December 10, 2010
For further information, please call: (512) 424-6710

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plans

Texas Education Agency

Title 19, Part 2

TRD-201100390
Filed: January 31, 2011

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Texas Board of Nursing

Title 22, Part 11

TRD-201100408
Filed: February 1, 2011

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Proposed Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 75, Curriculum, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 75 are organized under the following subchapters: Subchapter AA, Commissioner's Rules Concerning Driver Education Standards of Operation for Public Schools, Education Service Centers, and Colleges or Universities; and Subchapter BB, Commissioner's Rules Concerning Provisions for Career and Technical Education.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 75, Subchapters AA and BB, continue to exist.

The public comment period on the review of 19 TAC Chapter 75, Subchapters AA and BB, begins February 11, 2011, and ends March 14, 2011. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201100360
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: January 27, 2011

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The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 76, Extracurricular Activities, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 76 are organized under Subchapter AA, Commissioner's Rules.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 76, Subchapter AA, continue to exist.

The public comment period on the review of 19 TAC Chapter 76, Subchapter AA, begins February 11, 2011, and ends March 14, 2011. Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028.

TRD-201100361
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: January 27, 2011

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §60.123(I)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
Major property condition violations	Material Noncompliance	10	All programs	Yes
Pattern of minor property condition violations	10	5	All programs	Yes
Administrative reporting of property condition violations	0	0	HTC	Yes
Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder	Material Noncompliance	10	See §60.112	Yes
Owner failed to approve and distribute an Affirmative Marketing Plan as required under §60.114 of this chapter	10	3	See §60.112	No
Development failed to comply with requirements limiting minimum income standards for Section 8 residents	10	3	See §60.112	No
Development is not available to general public	10	0	HTC	Yes
HUD or DOJ notification of possible Fair Housing Act violation	0	0	HTC	Yes
Determination of a violation under the Fair Housing Act	Material Noncompliance	10	All programs	Yes
Development is out of compliance and never expected to comply/ Foreclosure	Material Noncompliance	NA/No correction possible	All programs	Yes
Owner did not allow on-site monitoring review	Material Noncompliance	5	All programs	Yes
LURA not in effect	Material Noncompliance	5	All programs	Yes
Development failed to meet minimum set aside	20	10	HTC Bonds	Yes
No evidence of, or failure to certify to, material participation of a non-profit or HUB, if required by the Land Use Restriction Agreement	10	3	HTC	Yes
Development failed to meet additional State required rent and occupancy restrictions	10	3	All programs	No

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
The Development failed to provide required supportive services as promised at Application	10	3	HTC Bonds	No
The Development failed to provide housing to the elderly as promised at Application	10	3	All programs	No
Failure to provide special needs housing	10	3	All programs	No
Changes in Eligible Basis or Applicable Percentage	3	NA, No correction possible	HTC	Yes
Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department	10	3	All programs	Yes
Utility Allowance not calculated properly	20	10	All programs	Yes
Owner failed to execute required lease provisions, including language required by §60.110 of this chapter or exclude prohibited lease language	10	3	HTC HOME	No
Failure to provide annual Housing Quality Standards inspection	10	3	HOME	NA
Development has failed to establish and maintain a reserve account in accordance with §1.37 of this title	Material Noncompliance	10	All programs	No
Development substantially changed the scope of services as presented at initial Application without prior Department approval	10	3	HTC	No
Failure to provide a notary public as promised at Application	10	3	HTC	No
Violations of the Unit Vacancy Rule	3	1	HTC	Yes
Casualty loss	0	0	All programs	Yes
Failure to provide pre-onsite documentation as required	10	3	All programs	No

Figure: 10 TAC §60.123(m)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
Unit not leased to Low Income Household	5	1	All programs	Yes
Low Income Units occupied by nonqualified full-time students	3	1	HTC during the compliance period and Bond	Yes
Low Income Units used on transient basis	3	1	HTC Bond	Yes
Household income increased above the re-certification limit and an available Unit was rented to a market tenant	3	1	HTC During the compliance period Bonds HOME HTF	Yes
Gross rent exceeds the highest rent allowed under the LURA or other deed restriction	5	1	All programs	Yes
Failure to maintain or provide tenant income certification and documentation	3	1	All programs	Yes
Unit not available for rent	3	1	All programs	Yes
Failure to maintain or provide Annual Eligibility Certification	3	1	All programs	No
Development evicted or terminated the tenancy of a low income tenant for other than good cause	10	3	HTC HOME	Yes
Household income increased above 80% at recertification and Owner failed to properly determine rent	3	1	HOME	NA

Figure: 28 TAC §5.4162(d)

TEXAS WINDSTORM INSURANCE ASSOCIATION PROCEDURE FOR CALCULATING MEMBER ASSESSMENT PERCENTAGES INCLUDING CREDIT FOR VOLUNTARY WRITINGS

[1] STATEWIDE DIRECT WRITTEN PREMIUMS	[2] NET DIRECT WRITTEN PREMIUMS	[3] COMPANY PERCENT OF STATEWIDE PREMIUMS WRITTEN	[4] TOTAL PREMIUMS IN CATASTROPHE AREAS
(a)(b)(c) E.C. CMP HO	Total of Col. [1](a) & (b) x 90% Col. [1](c) x 50%	[2] ÷ Total of [2]	(ASSOCIATION + VOLUNTARY)
[5] NORMAL REQUIRED QUOTA IN DESIGNATED AREAS	[6] CREDIT FOR COMPANY'S VOLUNTARY PREMIUMS	[7] DIFFERENCE BETWEEN NORMAL REQUIRED PARTICIPATION AND VOLUNTARY CREDIT PREMIUMS	[8] ASSOCIATION ASSESSMENT PERCENTAGE PRIOR TO OFFSET
([3] x [4])	(not to exceed column [5])	([5] - [6])	[7] ÷ Total of [7]
[9] NET ASSOCIATION ASSESSMENT PERCENTAGE			
(After application of offset)			

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Assistive and Rehabilitative Services

Notice of Public Hearing for DARS Maximum Affordable Payment Schedule (MAPS) to be effective April 1, 2011

The Department of Assistive and Rehabilitative Services (DARS) will hold a public hearing from 2:00 p.m. to 4:00 p.m. on Thursday, March 10, 2011, in Conference Room 3601 of the Brown-Heatly Building at 4900 North Lamar Boulevard in Austin, Texas 78751, to receive public comments on the proposed FY 2011-2012 Maximum Affordable Payment Schedule (MAPS) rates used for the purchase of medical and medical-related services. The proposed implementation date for the new MAPS rates is April 1, 2011.

The schedule of proposed rates may be viewed or copies may be obtained by calling Stuart McPhail with DARS at (512) 424-4144 or visiting DARS at the Brown Heatly Building at 4900 North Lamar; Austin, Texas 78751.

Written comments on the proposed rates may be submitted to Stuart McPhail, Department of Assistive and Rehabilitative Services, 4900 North Lamar Boulevard, Austin, Texas 78751.

TRD-201100411
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: February 1, 2011

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Office of the Attorney General

Request for Applications for the Other Victim Assistance Grant Program

The Office of the Attorney General (OAG) is soliciting local and statewide applications for projects that provide victim-related services or assistance. The purpose of the OAG Other Victim Assistance Grant (OVAG) program is to provide funds, using a competitive allocation method, to programs that address the unmet needs of victims by maintaining or increasing their access to quality services.

Applicable Funding Source for OVAG: The Texas Code of Criminal Procedure, Article 56.541(e) authorizes the OAG to use money appropriated from the Texas Compensation to Victims of Crime Fund for grants or contracts supporting victim related services or assistance. All funding is contingent upon an appropriation to the OAG by the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

Eligibility Requirements:

Eligible Applicants: Local units of government, non-profit agencies with 26 U.S.C. 501(c)(3) status; and state agencies are eligible to apply for an OVAG.

Eligibility: The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the Application Kit; the application is filed after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the Request for Applications (RFA) and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's official agency website at http://www.oag.state.tx.us/victims/grants.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

Deadlines and Filing Instructions for the Grant Application:

Registration Deadline: On-line registration is required to apply for an OVAG. The deadline to complete registration is 5:00 p.m. CST March 14, 2011. *If registration is not completed by the deadline, then an Application will not be accepted and is not eligible for funding.* To register go to: http://www.oag.state.tx.us/victims/grants.shtml.

Application Deadline: The applicant must submit its application, including all required attachments, to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST April 1, 2011 to be considered timely filed.

Filing Instructions: To meet the deadline, the Application must be submitted by *both* hard copy and email. An Application will be considered timely filed when the OAG receives the paper (hard copies) and the electronic (email) of the Application including any required attachments in the following ways by the required deadline:

1. Hard copies - Via a Next Day Air Overnight Delivery Service:

The Applicant must use a *Next Day Air Overnight Delivery Service* that tracks its deliveries. Submission by Next Day Air Overnight Delivery Service ensures that your Application can be tracked.

The Applicant must submit one (1) Original Application consisting of: One (1) Excel Workbook, One (1) Attachment A containing original signatures, One (1) Attachment B containing original signatures, One (1) Job Description for each position requested on the proposed budget, and Collaborative Agreement(s) for each collaboration (if required by the Applicant to achieve the proposed project as described in the Application) and Three (3) Hard Copies of the completed Excel Workbook (not including the attachments).

The Application should be printed on 8.5 x 11 inch paper. Separate each Application with a binder clip. Do not staple or otherwise bind Applications.

The Application must be sent to the following address:

CVS GRANTS APPLICATIONS - MC 005

OFFICE OF THE ATTORNEY GENERAL

300 W 15TH ST RM 102

AUSTIN, TX 78701-1649

The OAG cannot accept Applications submitted in other formats, including walk-in, hand delivery or same day courier service.

2. Email copies:

The Applicant must submit the Excel workbook by email.

The Excel workbook must be sent to the following email address: CVS-GrantsApplications@oag.state.tx.us

An auto-reply message will be generated by the OAG for email received at this address. If the Applicant does not receive an auto-reply message, they are strongly encouraged to contact the OAG immediately at (512) 936-1278.

The OAG will **not** consider an Application if it is not filed by the due date, 5:00 p.m. CST on April 1, 2011.

Minimum and Maximum Amounts of Funding Available: The minimum amount of funding all programs may apply for is $20,000 per fiscal year. The maximum amount a local program may apply for is $42,000 per fiscal year. The maximum amount a statewide program may apply for is $200,000 per fiscal year.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2011 through August 31, 2013, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements for OVAG projects.

Limited Volunteer Requirements: All non-governmental OVAG Applicants must use volunteers in some way to support the mission of their organization. Applicants must identify the role of a volunteer within the organization and describe program components related to recruitment, retention and training of volunteers. If the organization does not currently utilize volunteers, a plan must be provided explaining how a volunteer program will be developed and implemented during the grant term.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget. OVAG funding decisions will use a competitive allocation method.

OVAG Purpose Area: All OVAG projects must address one or more of the OVAG purpose areas: providing direct victim services including, but not limited to, counseling, crisis intervention, assistance with Crime Victim's Compensation, legal assistance, victim advocacy, and information and referral; providing outreach or community education to help identify crime victims who might not otherwise be reached and provide or refer them to needed services; connecting crime victims to services for the purpose of supporting or assisting in their recovery; training professionals and volunteers to improve their ability to inform victims of their rights, to assist victims in their recovery, or to establish a continuum of care for victims; or other support for victim related services or assistance as determined by the OAG.

Staffing: All OVAG projects must:

(a) Include one direct victim service staff person working at least twenty hours per week or two direct victim service staff persons working at least ten hours each per week in the applicant's budget. Direct Victim Services are defined in the Definitions section of the Application Kit.

(b) Include a minimum of 75% of an Applicant's budget in the Personnel and Fringe Benefits budget categories.

The above requirements apply to all OVAG Applicants, including those that rely upon volunteers or contracted staff to deliver direct victim services. The OAG may grant an exception to one or both of these requirements for projects that demonstrate a need in their Application. In addition, an Applicant is limited to no more than six positions, no more than three of which may be positions providing administrative support to the OVAG project.

Preference: The OAG reserves the right to consider all other appropriations or funding an applicant currently receives when making funding decisions. The OAG may give priority to applicants that do not receive other sources of funding, including funding that originates from the Texas Compensation to Victims of Crime Fund. The OAG reserves the right to give priority to programs that provide direct victim services with grant funds, that provide information and education about victims' rights in their community, or that utilize volunteers in providing services. The OAG may award OVAG funds to programs that applied for another OAG grant program.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of overtime, out of state travel, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact Jennifer McShane Ferguson at CVSGrantsApplications@oag.state.tx.us or (512) 936-1278.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201100436
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

♦ ♦ ♦

Request for Applications for the Sexual Assault Prevention and Crisis Services - Federal Program

The Crime Victim Services Division (CVSD) of the Office of the Attorney General (OAG) is soliciting applications from local and statewide programs that wish to utilize Sexual Assault Prevention and Crisis Services-Federal (SAPCS-Federal) funds for projects that support the primary prevention of sexual violence.

Applicable Funding Source: The source of federal funds includes the Federal Department of Health and Human Services, Preventative Health and Health Services Block Grant, Catalog of Federal Domestic Assistance (CFDA) Number 93.991 and Injury Prevention and Control Research and State and Community Based Programs, CFDA Number 93.136. The federal funds are used for grant contracts supporting the primary prevention of sexual violence. State funding may also be available. All funding is contingent upon the appropriation of funds by the United States Congress and the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

Eligibility Requirements:

Eligible Applicants: Local units of government, excluding law enforcement agencies and prosecutor's offices; non-profit agencies with 26 U.S.C. 501(c)(3) status; and state agencies are eligible to apply for a SAPCS-Federal grant.

Local Programs: Eligible local programs must meet the local program eligibility requirements for a SAPCS-State grant which means the local program must offer the following minimum services for at least nine months prior to receiving an SAPCS-Federal grant contract: 24-hour crisis hotline; crisis intervention; public education; advocacy and accompaniment to hospitals, law enforcement offices, prosecutor offices, and courts for survivors and their family members; and crisis intervention volunteer training.

Statewide Program: A statewide program, to be eligible for special project funding, must show that it supports efforts to maintain or expand existing services offered by local sexual assault programs; improve services to survivors; or other activities consistent with Texas Government Code, Chapter 420.

A local or statewide program does not have to actually apply or receive a SAPCS-State grant to meet these eligibility requirements for an SAPCS-Federal grant.

Eligibility: The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the Application Kit; the application is filed after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the Request for Applications (RFA) and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's official agency website at http://www.oag.state.tx.us/victims/grants.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

Deadlines and Filing Instructions for the Grant Application: *Registration Deadline:* On-line registration is required to apply for an SAPCS-Federal grant. The deadline to complete registration is 5:00 p.m. CST March14, 2011. *If registration is not completed by the deadline, then an Application will not be accepted and is not eligible for funding.* To register go to: http://www.oag.state.tx.us/victims/grants.shtml.

Application Deadline: The applicant must submit its application, including all required attachments, to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST April 1, 2011 to be considered timely filed.

Filing Instructions: To meet the deadline, the Application must be submitted by *both* hard copy and email. An Application will be considered timely filed when the OAG receives the paper (hard copies) and the electronic (email) of the Application including any required attachments in the following ways by the required deadline:

1. Hard copies - Via a Next Day Air Overnight Delivery Service:

The Applicant must use a *Next Day Air Overnight Delivery Service* that tracks its deliveries. Submission by Next Day Air Overnight Delivery Service ensures that your Application can be tracked.

The Applicant must submit one (1) Original Application consisting of: One (1) Excel Workbook, One (1) Attachment A containing original signatures, One (1) Attachment B containing original signatures, One (1) Job Description for each position requested on the proposed budget, and Collaborative Agreement(s) for each collaboration (if required by the Applicant to achieve the proposed project as described in the Application) and Three (3) Hard Copies of the completed Excel Workbook (not including the attachments).

The Application should be printed on 8.5 x 11 inch paper. Separate each Application with a binder clip. Do not staple or otherwise bind Applications.

The Application must be sent to the following address:

CVS GRANTS APPLICATIONS - MC 005

OFFICE OF THE ATTORNEY GENERAL

300 W 15TH ST RM 102

AUSTIN, TX 78701-1649

The OAG cannot accept Applications submitted in other formats, including walk-in, hand delivery or same day courier service.

2. Email copies:

The Applicant must submit the Excel workbook by email.

The Excel workbook must be sent to the following email address: CVS-GrantsApplications@oag.state.tx.us.

An auto-reply message will be generated by the OAG for email received at this address. If the Applicant does not receive an auto-reply message, they are strongly encouraged to contact the OAG immediately at (512) 936-1278.

The OAG will **not** consider an Application if it is not filed by the due date, 5:00 p.m. CST on April 1, 2011.

Minimum and Maximum Amounts of Funding Available: The minimum amount of funding all programs may apply for is $20,000 per fiscal year. The maximum amounts of funding are as follows: new local and new statewide programs - $25,000 per fiscal year; currently funded local programs - $150,000 per fiscal year; and currently funded statewide programs - $450,000 per fiscal year.

Regardless of the maximums stated above, a program may not apply, per fiscal year, for an amount higher than the SAPCS-Federal funds it received in fiscal year (FY) 2011. The amount of an award is determined solely by the OAG. The OAG may award grants at amounts above or below the established funding levels and is not obligated to fund a grant at the amount requested.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2011 through August 31, 2013, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements for SAPCS-Federal projects.

Volunteer Requirements: All SAPCS-Federal projects must have a volunteer component. Specific requirements for the volunteer component will be stated in the Application Kit.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget.

SAPCS Purpose Area: The purpose of the SAPCS-Federal program is to fund strategies and activities that support the primary prevention of sexual violence and any other purposes consistent with Texas Government Code, Chapter 420.

Staffing: All SAPCS-Federal projects must:

(a) Include a minimum of 75% of an applicant's budget in the personnel and fringe budget categories.

(b) Designate and request funding for a Primary Prevention Coordinator that is responsible for the coordination and implementation of primary prevention efforts. This position must, at a minimum, work 20 hours per week on primary prevention activities on the grant.

In addition, only those staff positions that are directly related to achieving the goals of this project will be funded (this includes staff that has direct involvement in the planning, implementation, or delivery of project activities and those who directly supervise such staff).

Preference: The OAG reserves the right to consider all other appropriations or funding an applicant currently receives when making funding decisions. The OAG may give priority to applicants that do not receive other sources of funding, including funding that originates from the Texas Compensation to Victims of Crime Fund.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of overtime, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit. Additional prohibitions include, but are not limited to, using grant funds for: construction and/or renovation; development of major software applications; direct counseling, treatment, or advocacy services to victims or perpetrators of sexual violence; media or awareness campaigns that exclusively promote awareness of where to receive victim services; research; and out-of-state travel for local programs.

OAG Contact Person: If additional information is needed, contact Jennifer McShane Ferguson at CVSGrantsApplications@oag.state.tx.us or (512) 936-1278.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201100437
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

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Request for Applications for the Sexual Assault Prevention and Crisis Services - State Program

The Crime Victim Services Division (CVSD) of the Office of the Attorney General (OAG) is soliciting applications from local and statewide programs that provide services to victims of sexual assault.

Applicable Funding Source: The source of state funds is a biennial appropriation by the Texas Legislature, these funds are constitutionally dedicated. Texas Code of Criminal Procedure, Article 56.541(e) authorizes the OAG to use money appropriated from the Texas Compensation to Victims of Crime Fund for grant contracts supporting victim-related services or assistance. Additional funding comes from parole fees pursuant to Texas Code of Criminal Procedure, Article 42.12, §19(e) and Texas Government Code, §508.189. All funding is contingent upon an appropriation to the OAG by the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

Eligibility Requirements:

Eligible Applicants: Local units of government, excluding law enforcement agencies and prosecutor's offices; non-profit agencies with 26 U.S.C. 501(c)(3) status; and state agencies are eligible to apply for a SAPCS-State grant.

Local Programs: A local program must offer the following minimum services for at least nine months prior to receiving a SAPCS-State grant contract: 24-hour crisis hotline; crisis intervention; public education; advocacy and accompaniment to hospitals, law enforcement offices, prosecutor offices, and courts for survivors and their family members; and crisis intervention volunteer training.

Statewide Program: A statewide program, to be eligible for special project funding, must show that it supports efforts to maintain or expand existing services offered by local sexual assault programs; improve services to survivors; or other activities consistent with Texas Government Code, Chapter 420.

Eligibility: The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the Application Kit; the application is filed after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the RFA and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's official agency website at http://www.oag.state.tx.us/victims/grants.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

Deadlines and Filing Instructions for the Grant Application: *Registration Deadline:* On-line registration is required to apply for an SAPCS-State grant. The deadline to complete registration is 5:00 p.m. CST March 14, 2011. *If registration is not completed by the deadline, then an Application will not be accepted and is not eligible for funding.* To register go to: http://www.oag.state.tx.us/victims/grants.shtml.

Application Deadline: The applicant must submit its application, including all required attachments, to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST April 1, 2011 to be considered timely filed.

Filing Instructions: **To meet the deadline, the Application must be submitted by both hard copy and email.** An Application will be considered timely filed when the OAG receives the paper (hard copies) and the electronic (email) of the Application including any required attachments in the following ways by the required deadline:

1. Hard copies - Via a Next Day Air Overnight Delivery Service:

The Applicant must use a *Next Day Air Overnight Delivery Service* that tracks its deliveries. Submission by Next Day Air Overnight Delivery Service ensures that your Application can be tracked.

The Applicant must submit one (1) Original Application consisting of: One (1) Excel Workbook, One (1) Attachment A containing original signatures, One (1) Attachment B containing original signatures, One (1) Job Description for each position requested on the proposed budget, and Collaborative Agreement(s) for each collaboration (if required by the Applicant to achieve the proposed project as described in the Application) and Three (3) Hard Copies of the completed Excel Workbook (not including the attachments).

The Application should be printed on 8.5 x 11 inch paper. Separate each Application with a binder clip. Do not staple or otherwise bind Applications.

The Application must be sent to the following address:

CVS GRANTS APPLICATIONS - MC 005

OFFICE OF THE ATTORNEY GENERAL

300 W 15TH ST RM 102

AUSTIN, TX 78701-1649

The OAG cannot accept Applications submitted in other formats, including walk-in, hand delivery or same day courier service.

2. Email copies:

The Applicant must submit the Excel workbook by email.

The Excel workbook must be sent to the following email address: CVSGrantsApplications@oag.state.tx.us.

An auto-reply message will be generated by the OAG for email received at this address. If the Applicant does not receive an auto-reply message, they are strongly encouraged to contact the OAG immediately at (512) 936-1278.

The OAG will **not** consider an Application if it is not filed by the due date, 5:00 p.m. CST on April 1, 2011.

Minimum and Maximum Amounts of Funding Available: The minimum amount of funding all programs may apply for is $20,000 per fiscal year. The maximum amounts of funding are as follows: new local and new statewide programs - $30,000 per fiscal year; currently funded local programs - $200,000 per fiscal year; and currently funded statewide programs - $300,000 per fiscal year.

Regardless of the maximums stated above, a program may not apply, per fiscal year, for an amount higher than the SAPCS-State funds it received in fiscal year (FY) 2011. The amount of an award is determined solely by the OAG. The OAG may award grants at amounts above or below the established funding levels and is not obligated to fund a grant at the amount requested.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2011 through August 31, 2013, subject to and contingent on funding and/or approval by the OAG.

No Match Requirements: There are no match requirements for SAPCS-State projects.

Volunteer Requirements: All SAPCS-State projects must have a volunteer component. Specific requirements for the volunteer component will be stated in the Application Kit.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget.

SAPCS Purpose Area: The purpose of the SAPCS-State program is to maintain or expand the existing services of local sexual assault programs and any other purposes consistent with Texas Government Code, Chapter 420.

Staffing: All SAPCS-State projects must:

(a) Include one direct victim service staff person working at least twenty hours per week or two direct victim service staff persons working at least ten hours each per week in the applicant's budget. Direct Victim Services are defined in the Definitions section of this Application Kit.

(b) Include a minimum of 75% of an Applicant's budget in the Personnel and Fringe Benefits budget categories.

The above requirements apply to all SAPCS-State Applicants, including those that rely upon volunteers or contracted staff to deliver direct victim services. The OAG may grant an exception to one or both of these requirements for projects that demonstrate a need in their Application.

In addition, an Applicant is limited to no more than six positions, no more than three of which may be positions providing administrative support to the SAPCS-State project.

Preference: The OAG reserves the right to consider all other appropriations or funding an applicant currently receives when making funding decisions. The OAG may give priority to applicants that do not receive other sources of funding, including funding that originates from the Texas Compensation to Victims of Crime Fund. The OAG reserves the right to give priority to programs that provide direct victim services with grant funds, that provide information and education about victims' rights in their community, or that utilize volunteers in providing services.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of overtime, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; out of state travel or costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact Jennifer McShane Ferguson at CVSGrantsApplications@oag.state.tx.us or (512) 936-1278.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201100434
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

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Request for Applications for the Victim Coordinator and Liaison Grant Program

The Crime Victim Services Division (CVSD) of the Office of the Attorney General (OAG) is soliciting applications for projects that provide victim-related services or assistance. The purpose of the OAG Victim Coordinator and Liaison Grant (VCLG) program is to fund the victim assistance coordinator and crime victim liaison positions for the purposes set forth in the Texas Code of Criminal Procedure, Article 56.04.

Applicable Funding Source for VCLG: The Texas Code of Criminal Procedure, Article 56.541(e) authorizes the OAG to use money appropriated from the Texas Compensation to Victims of Crime Fund for grants or contracts supporting victim related services or assistance. All

funding is contingent upon an appropriation to the OAG by the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

Eligibility Requirements:

Eligible Applicants: A local criminal prosecutor, defined as a district attorney, a criminal district attorney, a county attorney with felony responsibility, or a county attorney who prosecutes criminal cases, may apply for a grant to fund the position of a victim assistance coordinator (VAC). A local law enforcement agency, defined as the police department of a municipality or the sheriff's department of any county, may apply for a grant to fund the position of crime victim liaison (CVL).

Eligibility: The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the Application Kit; the application is filed after the deadline established in the Application Kit; or the application does not meet other requirements as stated in the Request for Applications (RFA) and the Application Kit.

How to Obtain Application Kit: The OAG will post the Application Kit on the OAG's official agency website at http://www.oag.state.tx.us/victims/grants.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

Deadlines and Filing Instructions for the Grant Application:

Registration Deadline: The deadline to complete registration is 5:00 p.m. CST March 14, 2011. On-line registration is required to apply for a VCLG. **If registration is not completed by the deadline, then an Application will not be accepted and is not eligible for funding.** To register go to: http://www.oag.state.tx.us/victims/grants.shtml.

Application Deadline: The applicant must submit its application, including all required attachments, to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST April 1, 2011 to be considered timely filed.

Filing Instructions: To meet the deadline, the Application must be submitted by *both* hard copy and email. An Application will be considered timely filed when the OAG receives the paper (hard copies) and the electronic (email) of the Application including any required attachments in the following ways by the required deadline:

1. Hard copies - Via a Next Day Air Overnight Delivery Service:

The Applicant must use a *Next Day Air Overnight Delivery Service* that tracks its deliveries. Submission by Next Day Air Overnight Delivery Service ensures that your Application can be tracked.

The Applicant must submit one (1) Original Application consisting of: One (1) Excel Workbook, One (1) Attachment A containing original signatures, One (1) Attachment B containing original signatures, One (1) Job Description for each position requested on the proposed budget, and Collaborative Agreement(s) for each collaboration (if required by the Applicant to achieve the proposed project as described in the Application) and Three (3) Hard Copies of the completed Excel Workbook (not including the attachments).

The Application should be printed on 8.5 x 11 inch paper. Separate each Application with a binder clip. Do not staple or otherwise bind Applications.

The Application must be sent to the following address:

CVS GRANTS APPLICATIONS - MC 005

OFFICE OF THE ATTORNEY GENERAL

300 W 15TH ST RM 102

AUSTIN, TX 78701-1649

The OAG cannot accept Applications submitted in other formats, including walk-in, hand delivery or same day courier service.

2. Email copies:

The Applicant must submit the Excel workbook by email.

The Excel workbook must be sent to the following email address: CVS-GrantsApplications@oag.state.tx.us

An auto-reply message will be generated by the OAG for email received at this address. If the Applicant does not receive an auto-reply message, they are strongly encouraged to contact the OAG immediately at (512) 936-1278.

The OAG will **not** consider an Application if it is not filed by the due date, 5:00 p.m. CST on April 1, 2011.

Minimum and Maximum Amounts of Funding Available: The minimum amount of funding a program may apply for is $20,000 per fiscal year. The maximum amount a program may apply for is $42,000 per fiscal year.

Start Date and Length of Grant Contract Period: The grant contract period (term) is up to two years from September 1, 2011 through August 31, 2013, subject to and contingent on funding and/or approval by the OAG.

No Match or Volunteer Requirements: There are no match or volunteer requirements for VCLG projects.

Award Criteria: The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components will include, but are not limited to, information provided by the applicant on the proposed project activities and budget.

VCLG Purpose Area: All VCLG projects must be used for victim assistance coordinator and/or crime victim liaison positions for the purposes set forth in Texas Code of Criminal Procedure, Article 56.04.

Staffing: All VCLG projects must:

(a) Include one VAC or CVL position working at least 20 hours per week or two positions working at least 10 hours each per week in the applicant's budget.

(b) Include at least 75% of the applicant's budget in the personnel and fringe budget categories.

Preference: The OAG reserves the right to consider all other appropriations or funding an applicant currently receives when making funding decisions. The OAG may give priority to applicants that do not receive other sources of funding, including funding that originates from the Texas Compensation to Victims of Crime Fund. The OAG reserves the right to give priority to programs that provide direct victim services with grant funds, that provide information and education about victims' rights in their community, or that utilize volunteers in providing services. The OAG may award Other Victim Assistance Grant (OVAG) funds to programs that would otherwise be eligible for funding under the VCLG program.

Prohibitions on Use of Grant Funds: OAG grant funds may not be used to support or pay the costs of overtime, out of state travel, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants

or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

OAG Contact Person: If additional information is needed, contact Jennifer McShane Ferguson at CVSGrantsApplications@oag.state.tx.us or (512) 936-1278.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201100435
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 2, 2011

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Cancer Prevention and Research Institute of Texas

Request for Applications C-12-COMP-1 Company Commercialization Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts. The goal of the Company Commercialization Award is to finance the development of innovative products, services, and infrastructure with significant potential impact on patient care. These investments will provide companies or limited partnerships located and headquartered in Texas, or those that are willing to relocate to Texas, with the opportunity to further the development of new products for the diagnosis, treatment, or prevention of cancer; to establish infrastructure that is critical to the development of a robust industry; or to fill a treatment or research gap. This award is intended to support companies that will be staffed with a majority of Texas-based employees, including C-level executives. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must have already received at least one round of professional institutional investment and must have or must commit to headquartering and registration in Texas; the majority of staff residing in or relocated to Texas; and use of Texas-based subcontractors and suppliers, unless adequate justification is provided for the use of out-of-state entities. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 15, 2011 through 3:00 p.m. Central Time on March 15, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201100428
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 2, 2011

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Request for Applications C-12-FORM-1 Company Formation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts. The goal of the Company Formation Award is to support the formation and establishment of new start-up companies in Texas that will develop products to significantly impact cancer care. These companies must be Texas-based or be willing to relocate to and remain in Texas for a specified period upon funding. Eligible products or services include, but are not limited to, therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must be early-stage start-up companies with no previous rounds of professional institutional investment. Successful applicants must commit to headquartering and registration in Texas; the majority of staff residing in Texas; and use of Texas-based subcontractors and suppliers, unless adequate justification is provided for the use of out-of-state entities. This is a 3-year funding program with an opportunity for renewal after the term expires. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 15, 2011 through 3:00 p.m. Central Time on March 15, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201100429
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 2, 2011

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Request for Applications C-12-RELO-1 Company Relocation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from companies or limited partnerships that are willing to relocate to Texas for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer

and the product development infrastructure needed to support these efforts. The goal of the Company Relocation Award is to attract industry partners in the field of cancer care to advance economic development and cancer care efforts in the state by recruiting to Texas companies with proven management teams who are focused on exceptional product opportunities to improve cancer care. Eligible products or services include, but are not limited to, therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must presently be domiciled outside Texas, and the majority of the staff, including C-level executives, must be willing to relocate to and remain in Texas for a specified period upon funding. This is a 3-year funding program with an opportunity for renewal after the term expires. Financial support will be awarded based upon the breadth and nature of the development program proposed. While requested funds must be well justified, no maximum is set on the amount that may be requested. Funding will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 15, 2011 through 3:00 p.m. Central Time on March 15, 2011, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201100431
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 2, 2011

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of January 18, 2011, through January 26, 2011. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on February 3, 2011. The public comment period for this project will close at 5:00 p.m. on March 4, 2011.

FEDERAL AGENCY ACTIONS:

Applicant: Tuft's Cove Investments; Location: The project is located adjacent to Corpus Christi Bay, on the west side of State Highway 361, on Mustang Island, around the area known as Wilson's Cut, in Corpus Christi, Nueces County, Texas. The project can be located primarily on the U.S.G.S. quadrangle map entitled: Crane Islands NW, Texas, with portions of the project area on the Port Aransas, TX and Port Ingleside, TX quadrangles. Approximate UTM Coordinates in NAD 83 (meters): Zone 14; Easting: 683740; Northing: 3069360. Project Description: The applicant proposes to construct a mixed-use marina and canal subdivision, consisting of a boat ramp, docking area, retail facilities, single-family and multi-family housing, and large, permanently protected conservation areas. The overall purpose of the project is to provide a residential canal subdivision, with a marina component, on Mustang and/or Padre Island that provides access to Corpus Christi Bay. The property contains 70.7 acres of waters of the U.S. and the proposed development will impact approximately 34.6 acres of those waters (approximately 14.4 acres filled and approximately 20.2 acres excavated). The development will include construction of an entrance channel off of Wilsons Cut with a series of navigable interior canals. The applicant proposes to deepen Wilson's Cut to -8 feet Mean Low Tide (MLT) and widen it to approximately 200 feet. It is the applicant's intent to get an easement for the existing channel from the Texas General Land Office and to improve and maintain it under a long-term lease agreement. Associated interior canals will range from approximately 260 to 300 feet wide with bottom elevations ranging from -8 MLT to -4 MLT at the terminal ends of the canals (Permit Drawings, Sheet 8). The applicant stated that bridges over waterways would allow for water circulation between canals. Approximately 750,000 cubic yards of material will be excavated to create the canal system. A portion of the excavated material will be used for build out of on-site lots and the remainder will be disposed of in an upland dredged material placement area. CMP Project No.: 11-0238-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00993 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: The Galveston Bay Foundation; Location: The project site is located in Galveston Bay and Pine Gully, near Seabrook, in Harris County, Texas. The project site can be located on the U.S.G.S. quadrangle map titled: Bacliff, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 306830; Northing: 3275034. Project Description: The applicant proposes to restore a 2,350-linear-foot section of Pine Gully by excavating 4.6 acres and filling 0.59 acre of the water body, to reshape the channel. In addition, the applicant proposed to reshape 270 linear feet of the north branch of Pine Gully, by excavating 0.45 acre, and filling 0.1 acre of open water. The applicant also proposes to construct three breakwaters at the confluence of Pine Gully with Galveston Bay. The applicant wishes to permit three possible options for constructing the breakwaters, so that they have some flexibility in determining the optimal design based on the results of their sediment transport study, and overall project budget. CMP Project No.: 11-0203-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-01192 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Samson Lone Star, LLC; Location: The project is located within a 494.6-square-mile (sq mi) area that includes wetlands, uplands, and open water habitat within and adjacent to the Gulf Intracoastal Waterway, Galveston Bay, East Bay, Trinity Bay, the Gulf of Mexico (GOM), Galveston Island, Pelican Island, and the Bolivar Peninsula, in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Caplen, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 340007; Northing: 3258292. Project Description: The applicant pro-

poses to conduct work within Section 404 and Section 10 waters of the United States utilizing air guns, vibroseis (land vibrating truck propagates signals into the earth), and shothole operational methodology as a source of energy for a three dimensional (3-D) seismic survey. The applicant is proposing to amend Department of the Army Permit No. SWG-2009-00233, issued to Global Geophysical Services, Inc. on 20 October 2010, to expand the project area and modify the project parameters. CMP Project No.: 11-0230-F1. Type of Application: U.S.A.C.E. permit application #SWG-2009-00233(Amd.) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Dennis Tuttle; Location: The project is located in the Gulf Intracoastal Waterway, at 1871 West Maple Street, in Port O'Connor, Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port O'Connor, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 752452; Northing: 3148293. Project Description: The applicant proposes to conduct work and install/reconstruct structures in navigable waters. Specifically, the applicant proposes to reconstruct decking, extend decking, remodel a house that extends over water, install new boat slips associated with the house, and construct new boat slips along the west side of an existing boat basin for dry lots north of the basin. The property owners on the east side will be responsible for their own structures on their individual waterfront lots. CMP Project No.: 11-0216-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00862 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review. Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Ms. Kate Zultner, Consistency Review Specialist, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201100407
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: February 1, 2011

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/07/11 - 02/13/11 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/07/11 - 02/13/11 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 02/01/11 - 02/28/11 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 02/01/11 - 02/28/11 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-201100402
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 1, 2011

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East Texas Council of Governments

Request for Proposals

As the Administrative unit for the Workforce Solutions East Texas Board, the East Texas Council of Governments (ETCOG) is soliciting proposals for the operation and management of Workforce Centers for a period beginning October 1, 2011 and extending through September 30, 2012 with the availability of four, one-year potential contract renewal options. The Workforce Solutions East Texas Board is making approximately $8,540,546 available through this Request for Proposals.

The Workforce Center Services Provider shall have the responsibility to manage all full service workforce centers and satellite offices. Full service workforce centers are located in Longview, Marshall, Palestine and Tyler. Satellite offices are located in Athens, Canton, Carthage, Emory, Gilmer, Henderson, Jacksonville, Jefferson, Pittsburg, and Quitman. The Workforce Center Services Provider shall have full responsibility for operation of the following programs: Workforce Investment Act (WIA) (Adult, Dislocated Worker and Youth); the Temporary Assistance to Needy Families (TANF) (including the Choices Program and other TANF funded activities), the Supplemental Nutrition Assistance Program (SNAP), the Employment Services (ES) Program, the Reintegration of Offenders (RIO) Program, and the Trade Adjustment Act (TAA) Program. The Workforce Solutions East Texas Board reserves the right to assign to the Workforce Center Services Provider responsibility for additional programs as new funding sources and programs come under the authority of the Board.

Proposers may be governmental units, public agencies, business organizations, labor organizations, public or private not-for-profit corporations, or private for-profit corporations organized in accordance with state and federal laws. A proposer may not be a deliverer of occupational or basic skills training in accordance with Texas House Bill 1863. A proposer who is currently a training provider but agrees to divest all training activities may apply under this proposal.

Proposers may submit a proposal under one of two options:

(1) Turn Key Workforce Center Operator - The Proposer provides the management and staffing of all positions in the workforce center through one company or organization. Management and staff are employees of the proposing entity.

(2) Managing Director with an Employer of Record Organization (EOR) - The proposing individual or entity may submit a proposal for the managing director function in partnership with an Employer of Record organization, to cover the staffing function for the workforce center system.

Persons or organizations wanting to receive a Request for Proposals (RFP) package should submit a request by letter, fax, or email to the East Texas Council of Governments, 3800 Stone Road, Kilgore, Texas

75662, Attn: Amanda Garner. The fax number for ETCOG is (903) 983-1440 or email amanda.garner@etcog.org. Questions concerning the RFP process should be addressed by email or fax to Amanda Garner or Gary Allen, gary.allen@etcog.org or fax (903) 983-1440.

The Request for Proposals package will not be released prior to February 1, 2011. The deadline for receipt of proposals is Friday, April 15, 2011 at 5:00 p.m. CDT.

Historically Underutilized Businesses (HUBs) are encouraged to apply. All programs and employers under the auspices of the Workforce Solutions East Texas Board are in compliance with EEO. Auxiliary aids and services are available, upon request, to individuals with disabilities.

TRD-201100401
David Cleveland
Executive Director
East Texas Council of Governments
Filed: January 31, 2011

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East Texas Regional Water Planning Group (Region I)

Request for Qualifications

The City of Nacogdoches, Texas, will receive sealed proposals at City Hall, City Manager's Office (Room 320), 202 East Pilar Street, Nacogdoches, Texas, for the following:

Professional Engineering Services for East Texas Regional Water Planning Group (Region I)

Bid Number: 20110104-001

Bid opening will be at 2:00 p.m. on Tuesday, March 1, 2011.

For a copy of the Request for Qualifications, contact: Gary Baisden, Purchasing Manager, P.O. Box 635070, Nacogdoches, Texas 75963-5070, (936) 559-2528.

TRD-201100398
Kelley Holcomb
Chair
East Texas Water Planning Group (Region I)
Filed: January 31, 2011

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Commission on State Emergency Communications

Annual Review of 1 TAC §255.4

The Commission on State Emergency Communications (CSEC) published notice of its annual review of the definitions in 1 TAC §255.4 of "local exchange access line" and "equivalent local exchange access line," in the October 22, 2010, issue of the *Texas Register* (35 TexReg 9537). CSEC's annual review is required by Texas Health and Safety Code §771.063(c).

No comments were received regarding CSEC's notice of annual review.

CSEC has determined not to propose amendments to the definitions in 1 TAC §255.4, and to leave in effect the rule as adopted in October 2007.

This concludes CSEC's annual review of 1 TAC §255.4.

TRD-201100430
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: February 2, 2011

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 14, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 14, 2011.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: American Marazzi Tile, Inc.; DOCKET NUMBER: 2010-1613-AIR-E; IDENTIFIER: RN100218080; LOCATION: Sunnyvale, Dallas County; TYPE OF FACILITY: ceramic tile manufacturing plant; RULE VIOLATED: 30 Texas Administrative Code (TAC) §116.115(b)(2)(F) and (c), Permit Number 19841, Special Condition (SC) Number 1, and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the maximum allowable emission rates (MAERs) for particulate matter, volatile organic compounds, and sulfur dioxide (SO_2); PENALTY: $16,350; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: BASF Corporation; DOCKET NUMBER: 2010-1726-AIR-E; IDENTIFIER: RN100225689; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.15(c), Air Permit Number 8199A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $4,100; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: BEAU RAY, INC. dba GREENLAND SQUARE SUBDIVISION WATER SYSTEM; DOCKET NUMBER: 2010-

1736-UTL-E; IDENTIFIER: RN102743093; LOCATION: Hockley, Harris County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a)and (j) and the Code, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval an emergency preparedness plan; PENALTY: $388; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: City of Crockett; DOCKET NUMBER: 2010-1501-MWD-E; IDENTIFIER: RN1016090741; LOCATION: Houston County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010154001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with permitted effluent limits for ammonia-nitrogen (NH_3N) and dissolved oxygen (DO); PENALTY: $9,850; Supplemental Environmental Project (SEP) offset amount of $7,880 applied to performing an erosion control project in Town Branch Creek to reduce siltation in a seasonal tributary; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Daheri & Talpur, Inc. dba Super Travel Center; DOCKET NUMBER: 2010-1785-PST-E; IDENTIFIER: RN102274891; LOCATION: Flatonia, Fayette County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the underground storage tank (UST) system; and 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: $1,999; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2545; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(6) COMPANY: Delek Refining, Limited; DOCKET NUMBER: 2010-1547-AIR-E; IDENTIFIER: RN100222512; LOCATION: Tyler, Smith County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.20(1), 116.115(c), and 122.143(4), 40 Code of Federal Regulations (CFR) §60.105(a), New Source Review (NSR) Permit Number 5955A, SC Numbers 3 and 12, Federal Operating Permit (FOP) Number 0-01257, Special Terms and Conditions (STC) Number 15, and THSC, §382.085(b), by failing to maintain in good working order the continuous emissions monitoring system (CEMS) for the measurement of SO_2 discharged into the atmosphere; and 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 4902, SC Number 9, and FOP Number O-01257, STC Number 15, and THSC, §382.085(b), by failing to install a CEMS to monitor and record carbon monoxide; PENALTY: $70,250; SEP offset amount of $28,100 applied to Texas Association of Resource Conservation and Development Areas, Inc. (RC&D) - Clean School Buses; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: DIRT FREE CARPET & UPHOLSTERY CLEANING, INC.; DOCKET NUMBER: 2010-1573-MSW-E; IDENTIFIER: RN105701536; LOCATION: Schertz, Guadalupe County; TYPE OF FACILITY: carpet cleaning company; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; 30 TAC §324.1 and §324.4(1), 40 CFR §279.22(d), and THSC, §371.103(c)(2), by failing to prevent a release of used oil; and 30 TAC §328.23(c)(2), by failing to securely close a container used to store used oil filters; PENALTY: $1,443; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: eco International, LLC; DOCKET NUMBER: 2010-1478-MSW-E; IDENTIFIER: RN105944102; LOCATION: Houston, Harris County; TYPE OF FACILITY: recycling; RULE VIOLATED: 30 TAC §§328.133(e)(1), 328.5(b), and 330.11(e)(2), by failing to provide notification prior to commencement of new operations as a owner or operator of a facility that serves as a collection and processing plant for only non-putrescible source-separated recyclable materials; and 30 TAC §328.149(b)(1)(D)(ii), by failing to provide bills of lading from each of the clients indicating dates of the receipt of material, the quantity of material, and the types of material received; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: City of Elkhart; DOCKET NUMBER: 2010-1462-MWD-E; IDENTIFIER: RN102844610; LOCATION: Anderson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010735001, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, TCEQ AO Docket Number 2008-1639-MWD-E, Ordering Provision Number 2, and THSC, §382.085(b), by failing to comply with permitted effluent limits for five-day biochemical oxygen demand, flow, DO, pH, and total suspended solids; PENALTY: $21,070; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: Enbridge G & P (North Texas), L.P.; DOCKET NUMBER: 2010-1676-AIR-E; IDENTIFIER: RN100226414; LOCATION: Springtown, Parker County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.504(a)(4)(A), General Operating Permit (GOP) Number 00442/Oil and Gas GOP Number 514, Site-wide requirements (b)(1), by failing to submit a required GOP application within 90 days after the issuance of a revised GOP; 30 TAC §§122.143(4), 122.147(a)(1), and 122.504(a)(5)(G), GOP Number 00442/Oil and Gas GOP Number 514, Site-side requirements (b)(1), and THSC, §382.085(b), by failing to install the required glycol dehydration system condenser exhaust temperature monitor to record the exhaust temperature; 30 TAC §§116.615(9), 122.143(4), and 122.147(a)(5), Standard Permit Registration Number 72046, GOP Number 00442/Oil and Gas GOP Number 514, Site-wide requirements (b)(1), and THSC, §382.085(b), by failing to properly operate and maintain the glycol still condenser and vapor recovery unit and to take necessary corrective actions to restore normal operation as expeditiously as practicable to minimize the period of any malfunction; and 30 TAC §122.143(4) and §122.145(2)(C), GOP Number 00442/Oil and Gas GOP Number 514, site-wide requirements (b)(1), and THSC, §382.085(b), by failing to timely submit a semi-annual deviation report; PENALTY: $10,125; ENFORCEMENT COORDINATOR: Allison Fischer, (512) 239-2574; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: FireWeed Corporation dba Kwik Fuels; DOCKET NUMBER: 2010-1649-PST-E; IDENTIFIER: RN101561975; LOCATION: Denison, Grayson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; PENALTY: $2,300; ENFORCEMENT COORDINATOR: Cara Windle, (512) 239-2581; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Harris County Water Corporation; DOCKET NUMBER: 2001-1803-UTL-E; IDENTIFIER: RN101214468; LOCATION: Hockley, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and the Code, §13.1395(b)(2), by failing to adopt and submit to the executive director for approval an emergency preparedness plan; PENALTY: $285; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77024-1452, (713) 767-3500.

(13) COMPANY: Hill County Harbor, L.P.; DOCKET NUMBER: 2010-1941-MWD-E; IDENTIFIER: RN101917458; LOCATION: Palo Pinto County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014173001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for NH_3N; PENALTY: $2,350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Huntsman Petrochemical, LLC; DOCKET NUMBER: 2010-1661-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-02288, STC Number 16 and General Terms and Conditions (GTC), NSR Permit Number 19823, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $21,700; SEP offset amount of $8,860 applied to Southeast Texas Regional Planning Commission - Meteorological and Air Monitoring Network; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: INEOS USA, LLC; DOCKET NUMBER: 2010-0507-AIR-E; IDENTIFIER: RN100238708; LOCATION: Alvin, Brazoria County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §101.211(a) and THSC, §382.085(b), by failing to submit a notification for the unplanned startup of the refrigeration compressor DC-301 in the Olefins One Unit; PENALTY: $10,050; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: L & L Pallet Supply, Inc.; DOCKET NUMBER: 2010-1854-AIR-E; IDENTIFIER: RN103006631; LOCATION: Amarillo, Randall County; TYPE OF FACILITY: pallet recycling company; RULE VIOLATED: 30 TAC §106.496(3), NSR Permit by Rule Registration Number 99626, and THSC, §382.085(b), by failing to ensure that the length of the trench did not exceed the length of the air blower manifold; 30 TAC §106.496(4), NSR Permit by Rule Registration Number 99626, and THSC, §382.085(b), by failing to maintain a written record or log of the hours of operation of the trench burner; 30 TAC §106.496(9), NSR Permit by Rule Registration Number 99626, and THSC, §382.085(b), by failing to ensure that stockpiled material to be burned at a later date is kept at least 75 feet from the trench; and 30 TAC §122.143(4) and §122.146(2), GOP Number O-3289/Air Curtain Incinerator GOP Number 518 Terms and Conditions (b)(2), and THSC, §382.085(b), by failing to submit an annual compliance certification report; PENALTY: $2,710; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(17) COMPANY: Las Palomas Water Services Company dba Lake Valley Water Company, Inc.; DOCKET NUMBER: 2010-1427-PWS-E; IDENTIFIER: RN101278521; LOCATION: Wilson County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(i) and THSC, §341.0315(a)(1), by failing to provide a well capacity of 0.6 gallons per minute per connection; PENALTY: $267; ENFORCEMENT COORDINATOR: Amanda Henry, (713) 767-3500; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(18) COMPANY: Mobil Chemical Company, Inc.; DOCKET NUMBER: 2009-1397-AIR-E; IDENTIFIER: RN100211903; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: polyethylene plastic manufacturing; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-02277, SC Number 9, Air Permit Number 8758, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $12,600; SEP offset amount of $5,040 applied to Southeast Texas Regional Planning Commission - Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(19) COMPANY: MUNRO DRY CLEANING COMPANY; DOCKET NUMBER: 2010-1479-IHW-E; IDENTIFIER: RN102979713; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: retail dry cleaning and laundry; RULE VIOLATED: 30 TAC §335.2(b), by failing to prevent the shipment of hazardous waste to an unauthorized storage facility; 30 TAC §335.13(k) and 40 CFR §262.42(b), by failing to submit an exception report to the executive director when the original signed copy of the manifests were not received within 45 days of the date that the waste was accepted by the initial transporter; and 30 TAC §335.69(f)(4) and 40 CFR §262.34(d)(4), by failing to have the beginning date of accumulation marked on a hazardous waste container; PENALTY: $6,525; SEP offset amount of $2,610 applied to RC&D - Cleanup of Unauthorized Trash Dumps; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(20) COMPANY: City of Newton; DOCKET NUMBER: 2010-0907-MLM-E; IDENTIFIER: RN102328770; LOCATION: Newton, Newton County; TYPE OF FACILITY: transfer station and used oil collection center; RULE VIOLATED: 30 TAC §330.219(a), by failing to maintain a copy of the municipal solid waste permit or registration at the facility or at an alternate location; 30 TAC §§330.219(b)(2), 330.221(c), and 330.247, by failing to train all employees in fire protection and health and safety procedures; 30 TAC §305.70(a) and §330.201(b), by failing to submit a permit modification application to incorporate the 2006 rule revisions to 30 TAC Chapter 330; 30 TAC §324.7(3)(B), 40 CFR §279.31(b)(2), and THSC, §371.024(b)(1), by failing to register as a used oil collection center each old numbers year no later than January 25 following the close of the year; 30 TAC §328.24(a) and (c), 40 CFR §279.31(b)(2), and THSC, §371.024(b)(1), by failing to register or renew the registration form as used oil filter processor and submit required reports; and 30 TAC §324.7(3)(E) and THSC, §371.024(b)(2), by failing to report annually the amount of used oil collected by January 25 of each year; PENALTY: $7,000; SEP offset amount of $5,600 applied to performing cleanup of an illegal trash dump along Meek Street between Martin Luther King Street and State Highway 87 and also along Sylvester Street; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(21) COMPANY: Northshore; DOCKET NUMBER: 2010-1159-PWS-E; IDENTIFIER: RN105715007; LOCATION: Denton County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure

to collect routine samples; PENALTY: $4,800; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: James Adamoli, Jr. and Mark Adamoli dba Northwoods Mobile Home Park; DOCKET NUMBER: 2010-1766-UTL-E; IDENTIFIER: RN102673779; LOCATION: Houston, Harris County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and the Code, §13,1395(b)(2), by failing to adopt and submit to the executive director for approval an emergency preparedness plan; PENALTY: $444; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Randy Earl Wyly dba Randy Wyly Dairy; DOCKET NUMBER: 2010-1938-AGR-E; IDENTIFIER: RN102065166; LOCATION: Erath County; TYPE OF FACILITY: concentrated animal feeding operation; RULE VIOLATED: 30 TAC §305.125(1) and §321.42(c) and TPDES Permit Number WQ0003160000, Part X, Special Provisions A.1 and A.2, by failing to complete the modifications of retention control structure Numbers 1 and 2 to meet the total capacity required by the permit within the prescribed timeframe; PENALTY: $2,520; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: RAS ENTERPRISES, INC. dba Lakewood Texaco; DOCKET NUMBER: 2010-1621-PST-E; IDENTIFIER: RN101541498; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor space manifolding and dynamic back pressure; PENALTY: $2,159; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Santa Rita Motors, Inc.; DOCKET NUMBER: 2010-1691-AIR-E; IDENTIFIER: RN105971048; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: vehicle dealership; RULE VIOLATED: 30 TAC §114.20(c)(1) and THSC, §382.085(b), by failing to equip a motor vehicle with either the control systems or devices that were originally a part of the motor vehicle or motor vehicle engine; and 30 TAC §114.20(c)(3) and THSC, §382.085(b), by failing to post the required notice describing the Texas Clean Air Act requirements and penalties; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(26) COMPANY: Shell Oil Company; DOCKET NUMBER: 2010-1439-IHW-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §335.173(a)(3), 40 CFR §264.301(a)(2), and Hazardous Waste Permit Number 50099, V. G. 4. G., by failing to ensure that the leachate depth in the leachate collection/leak detection system does not exceed 12 inches above the liner; PENALTY: $97,020; SEP offset amount of $38,808 applied to Armand Bayou Nature Center - Coastal Tall Grass Management - Prescribed Burn Program and Prairie Restoration Project; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: Sunoco, Inc. (R&M); DOCKET NUMBER: 2010-1652-AIR-E; IDENTIFIER: RN100524008; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: polypropylene plant; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2), and 122.146(1) and (2), FOP Number O-02314, GTC, and THSC, §382.085(b), by failing to submit the annual permit compliance certification; PENALTY: $15,825; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: Ken R. Swan; DOCKET NUMBER: 2010-1787-WR-E; IDENTIFIER: RN106003650; LOCATION: Jack County; TYPE OF FACILITY: private property; RULE VIOLATED: 30 TAC §297.11 and the Code, §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(29) COMPANY: City of Uvalde; DOCKET NUMBER: 2010-1340-MWD-E; IDENTIFIER: RN103119087; LOCATION: Uvalde County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010306001, Effluent Limitations and Monitoring Requirements Number 1 for Outfalls 001 and 002, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for NH_3N; PENALTY: $8,400; SEP offset amount of $6,720 applied to replanting the Cooks Slough Nature Park constructed wetland, which is a freshwater marsh with new emergent plantings including approximately 1,000 cattails and an equal number of soft-stem bulrushes; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3100; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(30) COMPANY: West Harris County Municipal Utility District Number 17; DOCKET NUMBER: 2010-1789-MWD-E; IDENTIFIER: RN102956422; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012247001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permit effluent limits for NH_3N; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201100404
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 1, 2011

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 14, 2011.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and

rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 14, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: City of O'Brien; DOCKET NUMBER: 2008-0454-MWD-E; TCEQ ID NUMBER: RN102835832; LOCATION: approximately 0.8 mile north of the intersection of State Highway (SH) 6 and Farm-to-Market Road 2229, north of the City of O'Brien on the west side of SH 6, Haskell County; TYPE OF FACILITY: domestic wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC §26.121(a), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013616001, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, by failing to comply with the permitted effluent limitations; 30 TAC §305.125(1) and TPDES Permit Number WQ0013616001, Monitoring and Reporting Requirements Number 7(c), by failing to notify the TCEQ within five working days of becoming aware of any effluent permit excursion of 40% or greater; 30 TAC §319.7(a) and TPDES Permit Number WQ0013616001, Monitoring and Reporting Requirements Number 3(c), by failing to record the pH collection and analytical time; 30 TAC §319.6 and TPDES Permit Number WQ0013616001, Monitoring and Reporting Requirements Number 1, by failing to calculate standards for dissolved oxygen readings to meet quality assurance requirements; 30 TAC §317.3(e)(4)(C), by failing to secure the lift station; 30 TAC §317.3(e)(5), by failing to provide an audiovisual alarm system for the lift station; 30 TAC §305.125(17) and §319.7(d) and TPDES Permit Number WQ0013616001, Monitoring and Reporting Requirements Number 1, by failing to submit the discharge monitoring report for the monthly monitoring periods of February 2006 - April 2007 and July - November 2007; 30 TAC §305.125(17) and TPDES Permit Number WQ0013616001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring periods ending July 31, 2006 and July 31, 2007 by September 1, 2006 and September 1, 2007; and 30 TAC §305.125(17) and TPDES Permit Number WQ0013616001, Other Requirements Number 4(k), by failing to submit monitoring results at the intervals specified in the permit; PENALTY: $37,409; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(2) COMPANY: Muhammad Altaf dba Country Food Store; DOCKET NUMBER: 2010-1626-PST-E; TCEQ ID NUMBER: RN101444941; LOCATION: 754 SH 62, Buna, Jasper County; TYPE OF FACILITY: four underground storage tanks (USTs) and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube for each regulated UST at the facility which clearly shows the UST identification number as listed on the UST registration and self-certification form; PENALTY: $1,100; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Quality Container and Environmental Services LLC; DOCKET NUMBER: 2010-0208-IHW-E; TCEQ ID NUMBER: RN105464481; LOCATION: 14308 Old Beaumont Highway, Houston, Harris County; TYPE OF FACILITY: waste container cleaning facility; RULES VIOLATED: 30 TAC §335.2(b), by failing to obtain authorization for hazardous waste storage at the facility; 30 TAC §335.112(a)(9) and §335.69(a)(1)(B) and 40 Code of Federal Regulations (CFR) §262.34(a)(1)(ii) and §265.193(a)(1), by failing to provide secondary containment meeting Resource Conservation and Recovery Act standards for tanks storing hazardous wastes; 30 TAC §335.9(a)(2), by failing to provide Annual Waste Summary reports; 30 TAC §335.6(c), by failing to update the Notice of Registrations in a timely manner; 30 TAC §335.62 and 40 CFR §262.11(b), (c)(1) and (2), by failing to conduct a hazardous waste determination for a waste stream; and 30 TAC §335.9(a)(1), by failing to maintain records related to waste generation, shipping, and applicable manifesting activities; PENALTY: $37,575; STAFF ATTORNEY: Laurencia Fasoyiro, Litigation Division, MC R-12, (713) 422-8914; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201100405
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 1, 2011

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Notice of Opportunity to Comment on Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Order (DO). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 14, 2011.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 14, 2011.**

Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Santos Barcenas dba Tyre King Recycling; DOCKET NUMBER: 2010-0575-MSW-E; TCEQ ID NUMBER: RN102954625; LOCATION: 1100 East 34th Street, Plainview, Hale County; TYPE OF FACILITY: scrap tire recycling facility; RULES VIOLATED: 30 TAC §328.55(1)(D) and Sale, Transfer, Merger (STM) Registration Number 6027064, by failing to prevent the on-site storage of more scrap tires than indicated on the facility's TCEQ STM Registration; PENALTY: $13,200; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7613.

TRD-201100406
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 1, 2011

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Notice of Receipt of Application and Intent to Obtain a New Municipal Solid Waste Permit (Proposed)

Permit No. 2371

APPLICATION. Brunson's Investment L.L.C., 15605 Horizon Boulevard, El Paso, El Paso County, Texas 79928, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Permit No. 2371, to operate a MSW Type V GG processing facility. The applicant is requesting a permit to install a domestic sewer sludge, grease trap, grit and septage waste processing system serving the County of El Paso. The facility is located at the address listed above. The TCEQ received the application on December 3, 2010. The permit application is available for viewing and copying at the Horizon Regional Municipal Utility District, 14100 Horizon Boulevard, Horizon City, El Paso County, Texas 79928.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/We] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address provided in the Agency Contacts and Information section below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, toll free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Brunson's Investment L.L.C. - Brunson's Waste Management Facility at the address provided in the Application section above or by calling Hector Villa, Consultant, Dorado Engineering, Inc., at (915) 562-0002.

TRD-201100441
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Notice of Water Quality Applications

The following notices were issued on January 21, 2011 through January 28, 2011.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

KATY SUN PARKS LTD has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0012189001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located at 20239 Ashley Street, approximately 1,000 feet north of Morton Road and 2,000 feet west of Fry Road in Houston in Harris County, Texas.

TEXAS PARKS AND WILDLIFE DEPARTMENT has applied for a renewal of TPDES Permit No. WQ0010896001 (E.P.A. I.D. No. TX0032549), which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,000 gallons per day. The facility is located approximately 4,300 feet north of the intersection of Peach Street and Park Road 38 in the Stephen F. Austin State Park in Austin County, Texas 77473.

AQUA UTILITIES INC has applied for a renewal of TPDES Permit No. WQ0014117001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located approximately 0.75 mile southwest of the intersection of West Little York (Fisher) Road and Brittmore Road in Harris County, Texas 77041.

OXY VINYLS L P which operates the Oxy Vinyls Battleground Facility, a caustic, chlorine, and hydrogen manufacturing plant, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0001539000 requesting: (a) the removal of effluent limitations and monitoring requirements for total aluminum at Outfall 001; (b) an increase in the effluent limitation for total copper, total lead, and total zinc at Outfall 001; (c) authorization to discharge hydrostatic test water, demineralizer and reverse osmosis wastewaters, and water treatment filter backwash via Outfall 001; (d) authorization to discharge non-contact cooling water, potable water, process wastewater, and utility wastewater intermittently via Outfall 002; (e) inclusion of the definition of utility wastewaters in the Other Requirements section; and (f) updating of the description of the facility location. The current permit authorizes the discharge of treated process wastewater, utility wastewaters, storm water, and previously monitored effluent (domestic wastewater via Outfall 201) at a daily average flow not to exceed 2,150,000 gallons per day via Outfall 001 and the discharge of storm water on an intermittent and flow variable basis via Outfall 002. The facility is located on the east side of State Park Road 1836 (Vista Road) approximately 1,000 feet northeast of its intersection with State Highway 134 (Independence Parkway) in the City of La Porte, Harris County, Texas 77571. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

DIAMOND SHAMROCK REFINING COMPANY L P which operates Valero McKee Refinery, an oil refining facility, has applied for a minor amendment to TPDES Permit No. WQ0003927000 to authorize the removal of references to the ammonia plant because this plant is no longer in operation. The existing permit authorizes the discharge of process wastewater, utility wastewater, domestic wastewater, and storm water at a daily average flow not to exceed 140,000 gallons per day via Outfall 001; storm water commingled with utility wastewater on an intermittent and flow variable basis via Outfall 002; storm water runoff on an intermittent and flow variable basis via Outfalls 003, 004, 005, 007, and 008. The facility is located at 6701 Farm-to-Market Road 119, approximately 500 feet northwest of the intersection of Farm-to-Market Road 119 and Farm-to-Market Road 1284, southwest of the City of Sunray, Moore County, Texas 79086.

GRIEF PACKAGING LLC which operates Houston Steel Drum Plant, has applied for a renewal of TPDES Permit No. WQ0004823000, which authorizes the discharge of reverse osmosis reject water, softener backwash, and storm water runoff at a daily average flow not to exceed 0.001533 million gallons per day (MGD) via Outfall 001. The facility is located at 10850 Strang Road, City of La Porte, Harris County, Texas.

ERVIN DON CRUTCHER which operates the Douglassville Timber Company, has applied for a renewal of TPDES Permit No. WQ0004828000, which authorizes the discharge of wet decking wastewater and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located approximately 0.75 mile northeast of the intersection of State Highway 82 and Farm-to-Market Road 114 on the south side of Farm-to-Market Road 114, Red River County, Texas 75426.

A-1 WASTEWATER SERVICES INC which proposes to operate A-1 Wastewater Services Inc Land Application Facility, has applied for a new permit, proposed permit No. WQ0004895000, to authorize the disposal of treated domestic wastewaters, treated restaurant wastewaters, treated grease trap wastewaters, and septage at a daily average flow not exceed 20,000 gallons per day via irrigation of 28 acres of Coastal Bermuda grass. This permit does not authorize any discharge of pollutants into water in the State. The facility and the land application site are located approximately 3,500 feet north-northwest of the intersection of Hayes Road and Farm-to-Market Road 418, Hardin County, Texas 77656.

CITY OF ROYSE CITY has applied for a renewal of TPDES Permit No. WQ0010366001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately one mile south of the intersection of Interstate Highway 30 and Farm-to-Market road 35 in Rockwall County, Texas 75189.

CITY OF MARSHALL has applied for a renewal of TPDES Permit No. WQ0010583002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 8,000,000 gallons per day. The facility is located southeast of the City of Marshall, approximately 1,800 feet southeast of the intersection of Interstate Highway 20 and Five Notch Road in Harrison County, Texas 75672.

HARDIN COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010678001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located north of Little Pine Island Bayou, approximately 2 miles north of the intersection of State Highway 105 and Pine Wood Boulevard in Hardin County, Texas 77659.

HULL FRESH WATER SUPPLY DISTRICT has applied for a renewal of TPDES Permit No. WQ0013544002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located approximately 0.75 mile northeast of the intersection of State Highway 770 and the Missouri Pacific Railroad in Liberty County, Texas 77564.

THE CITY OF QUINLAN has applied for a renewal of TPDES Permit No. WQ0013725001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located at 200 Myers Street, approximately 2,100 feet southwest of the intersection of State Highway 276 and State Business Highway 34 in Hunt County, Texas.

BLUE WATER OAKS PROPERTY OWNERS ASSOCIATION has applied for a renewal of TPDES Permit No. WQ0014411001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located approximately 100 feet west of the extreme southern shore of Lake Alvarado and approximately 3,000 feet east of County Road 313 in Johnson County, Texas 76009.

CITY OF ALBA has applied for a renewal of TPDES Permit No. WQ0014451001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located west of Farm-to-Market Road 17, one mile southwest of the intersection of State Highway 69 and Farm-to-Market Road 17, south of the City of Alba in Wood County, Texas 75410.

CLAY/PEEK 640 LP has applied for a renewal of TPDES Permit No. WQ0014635001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility will be located 1,500 feet west and 650 feet north of the intersection of Clay Road and Peek Road in Harris County, Texas 77493.

MA SEDONA LAKE LP has applied for a renewal of TPDES Permit No. WQ0014756001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located 1.1 miles east-northeast of the intersection of State Highway 288 and County Road 58 in Brazoria County, Texas 77578.

CMH PARKS INC has applied for a new permit, proposed TPDES Permit No. WQ0014967001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility was previously permitted under TPDES Permit No. 13962-001 which expired October 1, 2006. The facility is located approximately 2,500 feet northwest of the Community of Culleoka, immediately west of Farm-to-Market Road 982 and north of the Culleoka Baptist Church in Collin County, Texas 75407.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201100440
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Notice of Water Rights Applications

Notices issued January 27, 2011 through January 28, 2011.

APPLICATION NO. 12573; Denton County, 1505 East McKinney, Suite 175, Denton, Texas 76209, Applicant, has applied for a Water Use Permit to construct and maintain a dam and reservoir on an unnamed tributary of Pecan Creek, Trinity River Basin for recreational purposes in Denton County. The reservoir will be kept at a constant level by use of an existing groundwater well. More information on the application and how to participate in the permitting process is given below. The application was received on March 15, 2010. Additional information and fees were received on July 2, July 7, and July 15, 2010. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on July 19, 2010. The Executive Director completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions including, but not limited to maintenance of an alternate source of water. The application, technical memoranda, and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12479; Covered Bridge Canyon Home Owners Association, Inc., 108 Covered Bridge Drive, Fort Worth, Texas 76108, Applicant, has applied for a Water Use Permit to maintain seven existing dams and reservoirs on unnamed tributaries of Silver Creek, Trinity River Basin, for recreational purposes in Parker County. More information on the application and how to participate in the permitting process is given below. The application and partial fees were received on July 16, 2009, and additional information and fees were received on October 19, December 18, 2009 and January 12, January 14, and January 15, 2010. The application was declared administratively complete and filed with the Office of the Chief Clerk on January 28, 2010. The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would contain special conditions, including but not limited to, maintaining an alternate source of water so that no state water is used, requiring the permittee to pass inflows of state water required to satisfy senior water rights, and ensuring that any discharged commingled groundwater is of sufficient water quality. The application and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building. F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/We] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to

the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201100439
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on January 24, 2011, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. GW Carter Estate/Doray & Diane Hill; SOAH Docket No. 582-09-2078; TCEQ Docket No. 2006-1140-MSW-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against GW Carter Estate/Doray & Diane Hill on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201100442
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on January 28, 2011, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Joabert Development Company; SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Joabert Development Company on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201100443
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on January 31, 2011, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Noortima, Inc. D/B/A Nice N Easy Food Store; SOAH Docket No. 582-10-4247; TCEQ Docket No. 2009-1891-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Noortima, Inc. D/B/A Nice N Easy Food Store on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201100444
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 2, 2011

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Public Hearing on a Proposed Revision to 30 TAC Chapter 328

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding a proposed revision to 30 Texas Administrative Code (TAC) Chapter 328, Waste Minimization and Recycling, §328.66.

The proposed rulemaking would remove the requirement for applicants of Land Reclamation Projects Using Tires (LRPUT) to publish public notice in counties adjoining the county where the facility is proposed to be located.

The commission will hold a public hearing on this proposal in Austin on March 1, 2011 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-059-328-CE. The comment period closes March 11, 2011.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Brooke Jackson, Field Operations Support Division, (512) 239-0400.

TRD-201100382
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 28, 2011

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Public Hearing on a Proposed Revision to 30 TAC Chapter 334

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding a proposed revision to 30 Texas Administrative Code (TAC) Chapter 334, Underground and Aboveground Storage Tanks, §334.560.

The rulemaking would increase certain reimbursable amounts relating to: (1) offsite access fees charged by municipalities; (2) waste disposal costs; and (3) per diem costs.

The commission will hold a public hearing on this proposal in Austin on March 3, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-004-334-CE. The comment period closes March 13, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Jonathan Walling, Petroleum Storage Tank/Dry Cleaner Remediation Section, (512) 239-2295.

TRD-201100383
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 28, 2011

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Public Hearing on Proposed Revisions to 30 TAC Chapter 114 and Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 114, Control of Air Pollution from Motor Vehicles, §114.512 and §114.517; and to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed rulemaking would allow enforcement year-round; remove the expired prohibition for drivers using sleeper berths to idle in residential areas, school zones, and near hospitals; and remove expiration dates that are no longer applicable. Additionally, the proposed rulemaking would remove the duplicative exemption for a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less and replace it with a new exemption for armored vehicles; and retain the exemption for a motor vehicle when idling for heating or air conditioning while a driver is using the vehicle's sleeper berth for a government-mandated rest period and not within two miles of a facility offering external heating or conditioning, which expired on September 1, 2009.

The commission will hold a public hearing on this proposal in Austin on March 1, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle, and in Fort Worth on March 3, 2011, at 2:00 p.m. in the Public Meeting Room, at the DFW TCEQ Region 4 Office located at 2309 Gravel Road. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-054-114-EN. The comment period closes March 11, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Nina Castillo, Air Quality Planning Section, (512) 239-4415.

TRD-201100381
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 26, 2011

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Public Hearing on Proposed Revisions to 30 TAC Chapter 293

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 293, Water Districts, §293.44 under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would facilitate regionalization and cooperative planning among water districts and other local government entities by providing clear authorization in the commission's rules for a determination of a district's allowable cost participation in regional water, wastewater, and/or drainage facilities based on a cost-benefit analysis.

The commission will hold a public hearing on this proposal in Austin on March 8, 2011, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Natalia Henricksen, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-050-293-OW. The comment period closes March 14, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Gregory Charles, Water Supply Division, (512) 239-4638.

TRD-201100376
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: January 28, 2011

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Texas Facilities Commission

Request for Proposals #303-1-20270

The Texas Facilities Commission (TFC), on behalf of the Texas Health and Human Services Commission, the Department of Family and Protective Services, and the Department of Aging and Disability Services, announces the issuance of Request for Proposals (RFP) #303-1-20270. TFC seeks a five or ten year lease of approximately 7,342 square feet of usable office space in the City of Raymondville, Willacy County, Texas.

The deadline for questions is February 22, 2011, at 5:00 p.m. and the deadline for proposals is March 2, 2011, at 3:00 p.m. The target award date is April 20, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

All inquiries shall be submitted in writing with the RFP number in the subject line to Sandy M. Williams, CTPM at facsimile (512) 236-6171 or by email to sandy.williams@tfc.state.tx.us. Inquiries must be submitted no later than 5:00 p.m. on February 22, 2011, as stated above. TFC will not respond to telephone inquiries or visits by prospective respondents or their representatives, after the question submittal deadline.

Parties interested in submitting a proposal may obtain information by contacting TFC Contract Specialist Sandy Williams at (512) 475-0453 or sandy.williams@tfc.state.tx.us. The RFP and any addendum to the original RFP will be posted to the Electronic State Business Daily. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=92971.*

TRD-201100438
Kay Molina
General Counsel
Texas Facilities Commission
Filed: February 2, 2011

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Gary C. Bowes, Licensed State Land Surveyor, conducted December 16, 2010, locating the following shoreline boundary:

Survey in Matagorda County, on the east bank of the Colorado River same being a portion of the west boundary of the M.R. Williams Survey, Abstract 104, located approximately 7 miles SSW from Bay City and 5.5 miles WNW from the town of Wadsworth; south of FM Road 3057 and west of FM Road 2668, also known as Gilmore Road.

The line depicted on the survey fixes the shoreline for purposes of locating a shoreline boundary, subject to movement landward of that line. This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office, by phone at (512) 463-5212, email bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-201100424
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: February 2, 2011

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates for Substance Use Disorder - Medication Assisted Therapy (MAT) for Methadone

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on February 15, 2011, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Substance Use Disorder - Medication Assisted Therapy (MAT) for Methadone.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Title 1 Texas Administrative Code §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates are proposed to be effective March 1, 2011, for Substance Use Disorder - Medication Assisted Therapy (MAT) for Methadone.

Methodology and Justification. The proposed payment rate was calculated in accordance with 1 TAC:

§355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services; and

§355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after February 11, 2011. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201100366
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: January 27, 2011

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective March 1, 2011.

The amendment will modify the reimbursement methodologies in the Texas Medicaid State Plan as a result of Medicaid fee changes for Physicians and Certain Other Practitioners specifically addressing Substance Use Disorder - Medication Assisted Therapy (MAT) for Methadone.

The proposed amendments are estimated to result in annual savings of $671,580 for federal fiscal year (FFY) 2011, with approximately $446,332 in federal funds savings and $225,248 in State General Revenue (GR) savings. For FFY 2012, the estimated aggregate savings is $1,273,092, with approximately $741,194 in federal funds savings and $531,898 in GR savings.

Interested parties may obtain copies of the proposed amendment by contacting Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposals will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201100412
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: February 1, 2011

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Texas Department of Housing and Community Affairs

Announcement of the Neighborhood Stabilization Program One Program Income NOFA (NSP1-PI)

I. Background and Purpose of the Neighborhood Stabilization Program.

The Neighborhood Stabilization Program (NSP) is a HUD-funded program authorized by HR3221, the "Housing and Economic Recovery Act of 2008" (HERA), as a supplemental allocation to the Community Development Block Grant (CDBG) Program through an amendment to the existing State of Texas 2008 CDBG Action Plan. The purpose of the program is to redevelop into affordable housing, or acquire and hold, abandoned and foreclosed properties in areas that are documented to have the greatest need for arresting declining property values as a result of excessive foreclosures.

The NSP1-PI NOFA will make approximately $10,000,000 available to organizations for the redevelopment of abandoned, foreclosed, and vacant homes and residential properties. The funds will be awarded based on a reservation system and the results of a review of applications submitted in response to this NOFA.

II. Neighborhood Stabilization Program One Program Income NOFA (NSP1-PI).

Because Program Income will be available only as repayments from Texas NSP1 and Texas NSP-R are made, these funds will be made available under a Reservation System. Eligible applicants will be able to apply to participate in the NSP1-PI Reservation System during two periods each year. Applicants will be presented to the TDHCA Governing Board for approval. If the available funds under NSP1-PI exceed $1,000,000 for more than 30 days, the Texas Department of Housing and Community Affairs (TDHCA) may accept applications from new participants in order to fully utilize the funds. The availability of applications will be announced on the TDHCA website. The first regular application cycle will begin in February, 2011.

Each applicant will be required to submit an application to participate in the NSP1-PI Reservation System. Once an applicant is eligible, they will retain their eligibility through December 31, 2012, unless the applicant has an event that causes them to lose their eligibility per the NSP Agreement, TDHCA Rules, or Federal Requirements. After an initial round of applicant qualification, the Department will release an application for funding in the 3rd quarter of 2011, depending on funding availability.

III. NS1-PI NOFA Qualifications.

Eligible applicants for rental properties are nonprofit organizations as described in §501(c)(3) or (c)(4) of the Internal Revenue Code who are required by federal rules to follow 24 CFR Part 84. Eligible applicants for homebuyer properties are units of general local government (including public housing authorities) who are required by federal rules to follow 24 CFR Part 85, nonprofit organizations as described in §501(c)(3) or (c)(4) of the Internal Revenue Code, who are required by federal rules to follow 24 CFR Part 84, and Housing Finance Corpo-

rations authorized under the provisions of the Texas Housing Finance Corporation Act, Texas Government Code, Chapter 394.

Mailing Address:

Ms. Marni Holloway, Texas NSP Manager

Neighborhood Stabilization Program

Texas Department of Housing and Community Affairs

Post Office Box 13941

Austin, Texas 78711-3941

(All U.S. Postal Service including Express)

Courier Delivery:

221 East 11th Street, 3rd Floor

Austin, Texas 78701

(FedEx, UPS, Overnight, etc.)

Hand Delivery: If you are hand delivering the application, contact Marni Holloway at (512) 475-3726 (marni.holloway@tdhca.state.tx.us) or Megan Sylvester at (512) 463-2179 (megan.sylvester@tdhca.state.tx.us) when you arrive at the lobby of our building for application acceptance.

NSP1-PI NOFA Application Workshop

TDHCA will present an application workshop in the form of a webinar on a date to be determined. Participation in the application workshop webinar is not mandatory and will not be a factor in awarding NSP funds.

Questions. Questions pertaining to the content of the NSP1-PI NOFA may be directed to Marni Holloway at (512) 475-3726 (marni.holloway@tdhca.state.tx.us).

TRD-201100448
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 2, 2011

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Announcement of the Opening of the Public Comment Period for the Draft Substantial Amendment to the State of Texas FFY 2010 Action Plan

The Texas Department of Housing and Community Affairs (the "Department") announces the opening of a 15-day public comment period for an amendment to the *State of Texas FFY 2010 Action Plan* as required by the U.S. Department of Housing and Urban Development (HUD). The Amendment is necessary as part of the overall requirements governing the State's consolidated planning process. The Amendment is submitted in compliance with 24 CFR §91.520, Consolidated Plan Submissions for Community Planning and Development Programs, as modified by the *Federal Register* Notice (Docket No.FR-5321-N-03). The 15-day public comment period begins February 9, 2011, and continues until 5:00 p.m. on February 24, 2011.

This amendment outlines the expected distribution and use of $7,284,978.00 through the Neighborhood Stabilization Program (NSP), which HUD is providing to the State of Texas. This allocation of funds is provided under Section 1497 of the Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203, approved July 21, 2010) ("Dodd-Frank Act").

Beginning February 9, 2011, the Substantial Amendment will be available on the Department's website at www.tdhca.state.tx.us. A hard copy can be requested by contacting the Texas Neighborhood Stablization Program at P.O. Box 13941, Austin, TX 78711-3941 or by calling (512) 463-2179.

Written comment should be sent by mail to Megan Sylvester, Texas Department of Housing and Community Affairs, Neighborhood Stablization Program, P.O. Box 13941, Austin, TX 78711-3941, by email to megan.sylvester@tdhca.state.tx.us, or by fax to (512) 475-3746.

TRD-201100447
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 2, 2011

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Public Hearing for the Program Year (PY) 2011 Weatherization Assistance Program Plan/Application

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing to receive comments on the draft PY 2011 Texas Weatherization Assistance Program (WAP) State Plan. Texas anticipates receiving an allocation of $4,294,261 regular annual allocation based on estimated 2010 level funding for PY 2011. Funding to subrecipients may be adjusted slightly based on the approved plan, the final 2011 regular annual allocation, and the allocation of carryover funds.

The public hearing will be held at 2:00 p.m. on Wednesday, February 23, 2011 in Room #116, State Insurance Building Annex, 221 East 11th Street, Austin, Texas. (The State Insurance Building Annex is situated directly across the street from the Capitol Visitor's Center, on the southwest corner of East 11th and San Jacinto streets.) At the hearing, a representative from TDHCA will describe changes to the WAP and the proposed use of the U.S. Department of Energy funds for PY 2011, which will be for the period of April 1, 2011 to March 31, 2012.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the PY 2011 Texas Weatherization Assistance Program State Plan and Application. Written comments from those who cannot attend the hearing in person may be provided by the close of business at 5:00 p.m. on February 23, 2011, to Ms. Cate Taylor, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711 or by electronic mail to cate.taylor@tdhca.state.tx.us. A copy of the proposed Draft Plan may be obtained, after February 11, 2011, through TDHCA's web site, http://www.tdhca.state.tx.us/ea/index.htm or by calling Ms. Taylor at (512) 475-1435 or by writing to Ms. Taylor at the TDHCA address given above.

Individuals who require auxiliary aids or services for this meeting should contact Ms. Gina Esteves, ADA responsible employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two (2) days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Cate Taylor, (512) 475-1435 at least three (3) days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-201100400

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: January 31, 2011

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by DESTINY HEALTH INSURANCE COMPANY, a foreign life, accident and/or health company. The home office is in Chicago, Illinois.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201100432
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 2, 2011

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Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

UniCare Health Insurance Company of Texas, Inc.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Policy Development Division - Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of UniCare Health Insurance Company of Texas, Inc. to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-91204. Upon consideration of the application and comments, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the applicant to be a risk-assuming health benefit plan issuer.

TRD-201100397
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: January 31, 2011

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 27, 2011, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act.

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority, Project Number 39108.

The requested amendment is to expand the service area footprint to include Mesquite, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) 1-800-735-2989. All inquiries should reference Project Number 39108.

TRD-201100387
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 28, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 31, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Buford Media Group, L.L.C. to Amend its State-Issued Certificate of Franchise Authority, Project Number 39113.

The Applicant is seeking to reduce its service area footprint by removing Naples/Omaha, Texas from its service area footprint.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 39113.

TRD-201100423
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2011

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 28, 2011, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone Company d/b/a AT&T Texas' (AT&T Texas) request for assign-

ment of 20,000 (2 NXX) codes of numbers in the Tyler rate center rate center.

Docket Title and Number: Petition of AT&T Texas for Waiver of Denial of Numbering Resources, Docket Number 39111.

The Application: AT&T Texas requested 20,000 (2 NXX) codes of numbers on behalf of its customer, Trinity Mother Frances Hospital, in the Tyler rate center. AT&T Texas submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because AT&T Texas did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than February 18, 2011. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 39111.

TRD-201100422
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 1, 2011

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Etex Telephone Cooperative, Inc.'s (Etex) application filed with the Public Utility Commission of Texas (commission) on January 14, 2011, to implement a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Application of Etex Telephone Cooperative, Inc. for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171, Tariff Control Number 39078.

The Application: Etex filed an application to implement a minor rate change to equalize and increase all access line rates for Etex's seven exchanges. The proposed effective date for the proposed rate changes is May 1, 2011. The estimated annual revenue increase recognized by Etex is $61,237.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by March 28, 2011, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by March 5, 2011. Requests to intervene should be filed with the Commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free at 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 39078.

TRD-201100386
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 28, 2011

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South East Texas Regional Planning Commission

Notice of Bidders

GENERAL: The 9-1-1 Emergency Network, a Division of the South East Texas Regional Planning Commission (SETRPC), is interested in purchasing Licensed/Bonded Electrician services for approximately March 11, 2011 through August 31, 2013.

INVITATION FOR BID: The competitive Invitation For Bid (IFB) will be available at the 9-1-1 Emergency Network office located at 2210 Eastex Freeway, Beaumont, TX, 77703 or the SETRPC website (www.setrpc.org) after 8 A.M. on Febuary 11, 2011. Except for holidays, the 9-1-1 Emergency Network office is open 8 to 12 A.M. and 1 to 5 P.M. Monday through Friday. Copies of the IFB are available in Microsoft Office "Word" format at the above website. Once the website is displayed, navigate your cursor to the left "Main Menu" column, click on "RFP/IFB", under "Request for Proposal" click on "9-1-1 Electrician Services IFB" and download the "Word" document.

BID OPENING: Bid opening will be at 10:00 A.M., Tuesday March 8, 2011, at the SETRPC office at 2210 Eastex Freeway, Beaumont, Texas. The 9-1-1 Emergency Network reserves the right to reject any or all bids and does not bind itself to accept the lowest bid for the Electrical Services or any part thereof, and shall have the right to ask for new bids for the whole or parts.

TRD-201100433
Arthur Klauss
Contract Finance Analyst
South East Texas Regional Planning Commission
Filed: February 2, 2011

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The University of Texas System

Notice of Intent to Seek Consultant Services

The University of Texas Southwestern Medical Center at Dallas

In accordance with the provisions of Texas Government Code, Chapter 2254, The University of Texas Southwestern Medical Center at Dallas (University) will be seeking Requests for Proposals to hire a consultant to perform the following services: (1) assist University with the preparation and review of requests for proposal for electric supply, natural gas supply and natural gas transportation contracts, (2) assist University with cultivating market interest in the requests for proposal, (3) assist University with the evaluation of proposals received in response to requests for proposal, including vetting the proposal pricing with the current market conditions to confirm the proposals are reasonable, (4) assist University in evaluating, negotiating, executing and managing electric supply, natural gas supply and natural gas transportation contracts, including advising University on market contract norms; and (5) assist University with post contract matters, including nominating, balancing, reviewing invoices, advice on timing of price locks, reviewing proposed contract changes and assessing energy demand response incentive programs.

The President of The University of Texas Southwestern Medical Center at Dallas had made a finding of fact that the consulting services are necessary. The University does not currently have the in-house expertise to complete this project.

An award will be made to the proposer that submits the highest ranked proposal based on evaluation criteria developed by the University.

Parties interested in a copy of the Request for Proposal should contact:

Robert Butler

Senior Buyer

Physical Plant Purchasing

The University of Texas Southwestern Medical Center at Dallas

5323 Harry Hines Blvd.

Dallas, Texas 75390

Voice: (214) 648-2402

Email: robertbutler@utsouthwestern.edu

The proposal submission deadline will be Monday, February 21, 2011 at 3:00 p.m. Central Time.

TRD-201100420
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: February 1, 2011

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Upper Rio Grande Workforce Development Board

Request for Proposals

The Upper Rio Grande Workforce Development Board dba/Workforce Solutions Upper Rio Grande announces the issuance of PY11-RFP-200-132: Management and Operation of Workforce Solutions Upper Rio Grande Career Centers in El Paso County.

The authorized Workforce Board contact person for this procurement is Teofilo Ugalde, Chief Operating Officer and Director of Operations, Upper Rio Grande Workforce Development Board, 221 N. Kansas St., Suite 1000, El Paso, Texas 79901, Telephone: (915) 772-2002, Ext. 274, Fax: (915) 351-2790 or via email at teofilo.ugalde@urgjobs.org.

The Procurement and Contracts Management staff (or Workforce Board representative) must physically receive responses to this RFP no later than: 5:00 p.m. March 15, 2011 Mountain Standard Time (MST). Any reasonable delivery method may be used. Use of a traceable delivery method, such as certified mail-return receipt requested, guaranteed express service, or hand delivery is recommended. Submissions postmarked prior to the due date of March 15, 2011 but received after the due date of March 15, 2011 will not be considered. No facsimile or email may be used.

Request for Proposal packets will be available beginning on and after 12:00 p.m. MDT, January 31, 2011 at the above address. Packets may be picked up in person or requested in writing. The RFP will also be available on the Workforce Board website at www.urgjobs.org under the Procurements section.

TRD-201100399
Lorenzo Reyes, Jr.
Chief Executive Officer
Upper Rio Grande Workforce Development Board
Filed: January 31, 2011

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 36 (2011) is cited as follows: 36 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*